Supreme Court, U.S.
FILED

No. 04 276 AUG 26 2004

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IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH J. PEASLEY,

Petitioner,

v.

STATE BAR OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari
To The Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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Date Mailed: August 26, 2004

QUESTIONS PRESENTED FOR REVIEW

The hearing officer who presided over petitioner's disbarment relied heavily upon a finding of prosecutorial misconduct made by a superior court judge in an underlying murder case which case later became the subject of the bar disciplinary proceedings. Did petitioner's resulting disbarment violate his rights to due process guaranteed by the Fourteenth Amendment where:

(1) Before the superior court judge found petitioner guilty of misconduct, the judge had met secretly in chambers with an FBI agent who sought to convince him of petitioner's misconduct; and

(2) The hearing officer denied petitioner's repeated requests to call the superior court judge as a witness at the disbarment hearing.

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No. _____

IN THE

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KENNETH J. PEASLEY,

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STATE BAR OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

Petitioner, Kenneth J. Peasley, asks this Court to issue a writ of certiorari to review the judgment of the Arizona Supreme Court entered on May 28, 2004, in a published opinion ordering petitioner's disbarment.

OPINION AND ORDERS BELOW

The Arizona Supreme Court's published opinion, entered May 28, 2004, ordering Petitioner's disbarment is found at *In re Peasley*, ____ Ariz. ____, 90 P.3d 764 (Ariz. 2004), and is in Appendix A. The report of the disciplinary commission of the Arizona Supreme Court recommending petitioner's disbarment entered December 16, 2002, is in Appendix B. The hearing officer's report and recommendation that petitioner be suspended for a period of sixty days is dated July 1, 2002, and is in Appendix C. The minute entry order of Superior Court Judge Richard Nichols dated July 31, 1998, is in Appendix D.

BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257 to review the May 28, 2004, published decision of the Arizona Supreme Court ordering petitioner's disbarment and rejecting his due process claims. This petition for writ of certiorari is timely because it is being filed and served within ninety days of the Arizona Supreme Court's opinion. *See* Rules 13(e) and 29(2)(4), Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A.

On April 6, 1998, Pima County Superior Court Judge Richard Nichols met secretly with FBI Agent Clifford Goodman in chambers.[1] (R. app. H; R. app. G at 16, 20) Agent Goodman was conducting a criminal investigation of petitioner for his actions as a prosecutor in a series of cases known as the El Grande homicides.[2] (R. app. G at 20) Judge Nichols was permanently assigned to the trials of two of the El Grande defendants. (R. app. B at ¶¶ 6, 7, 31, 40) There had been a hung jury in one of the cases and another trial date had been set. (*Id.* at ¶¶ 6, 8).

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[1]The record before the Arizona Supreme Court consisted of appendices done in connection with a petition for review and a supplemental brief. Citations to these materials will appear as "R. app. __" and "R.s.b. __", respectively. Citations to the appendices which accompany this petition will appear as "App. __".

[2]There was an ongoing state grand jury investigation of petitioner for his role in prosecuting the El Grande cases. Petitioner and Agent Goodman testified before the grand jury which, by a vote of 11-2, returned a "no bill" on June 25, 1999.

The *ex parte* meeting between the judge and the FBI agent lasted one hour. (R. app. G at 17-18) They discussed the conduct of petitioner in the El Grande trials wherein he elicited testimony from his investigating detective that contradicted the detective's reports. (R. app. H) The agent sought to persuade the judge that petitioner had purposefully put on false testimony. (R. app. G at 17-18)

Two months *earlier*, on February 13, 1998, Judge Nichols had denied a defense motion filed on behalf of an El Grande defendant to dismiss the charges based on allegations of misconduct by petitioner. (R. app. C at ¶¶ 78, 81; R. app. I at ¶ 3) The judge denied the motion without granting an evidentiary hearing. (*Id.*)

After the FBI meeting with Judge Nichols, the defense attorneys filed another motion, similar to the first, seeking dismissal claiming that petitioner had intentionally elicited false testimony in the hung jury trial. (R. app. C at ¶ 79) The second motion was filed on June 19, 1998, and came on for hearing on July 31, 1998, before Judge Nichols. (*Id.* at ¶¶ 79, 80)

At the July 31, 1998 hearing, a prosecutor other than petitioner represented the State. (R. app. I at ¶ 2) He reminded Judge Nichols that the defense motion was substantially the same as the earlier motion and urged the judge to deny the motion without taking evidence. (*Id.* at ¶ 3; R. app. C at ¶ 81) The judge rejected this request and the hearing went forward. (*Id.*)

At no time prior to or during the hearing did Judge Nichols inform the parties of his *ex parte* meeting with the FBI agent. (R. app. I at ¶¶ 7, 8) At no time prior to or during the hearing did the judge tell the parties that he had discussed at length with the FBI the same precise issue raised in the motion in terms of petitioner's claimed misconduct. (*Id.*) At no time prior to or during the hearing did the judge disclose to the parties that the FBI agent had sought to persuade him of petitioner's misconduct. (*Id.*)

Handicapped by the judge's failure to disclose his *ex parte* meeting with the FBI, the prosecution participated in the July 31, 1998, hearing. (*Id.*) Petitioner testified, admitting he made mistakes in eliciting testimony from his detective but insisting that those mistakes

resulted from negligence.[3] (Resp. exh. 34) Following testimony, the judge issued his minute entry order ruling "that there was misconduct on the part of the (petitioner)" specifically finding that his actions were "not merely the result of legal error, negligence, or mistake or insignificant impropriety" and that petitioner's "conduct was engaged in with an indifference to a significant danger of a mistrial or reversal". (App. D)

B.

Nearly two years later, the state bar filed its complaint against petitioner. (R. app. C) Four of the five counts involved proceedings presided over by Judge Nichols. (*Id.* at 13-30) The penultimate paragraph to the state bar's complaint quoted verbatim from the judge's July 31, 1998, minute entry order finding petitioner guilty of misconduct. (*Id.* at ¶ 82)

The undersigned took the *partial* deposition of the judge in the bar proceedings on November 6, 2000. (R. app. G) At this point in the case, the state bar had refused to disclose any of the FBI reports to include the report done by Agent Goodman documenting his *ex parte* meeting with the judge that took place on April 6, 1998. (*Id.* at 21)

The deposition of the judge was not completed due to the judge's schedule. (R.s.b. F at 1894) Bar counsel agreed to finish the deposition at a later date. (*Id.*) In his partial deposition, the judge testified to meeting with Agent Goodman but falsely stated that the meeting occurred *after* his July 31, 1998, decision wherein he had found petitioner guilty of misconduct. (R. app. G at 19) In fact, as we now know, the judge's *ex parte* meeting with the FBI agent took place April 6, 1998, nearly four months *before* the July 31, 1998, hearing and misconduct finding. (R. app. H)

Bar counsel had the reports done by the FBI at the time of the judge's deposition. (R. app. G at 22) Even so, bar counsel did nothing to correct the judge's testimony regarding the timing of his meeting with

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[3]Five different defense lawyers representing the El Grande defendants had likewise mistakenly failed to appreciate that the detective's testimony was inconsistent with his reports. For this reason, they had failed to impeach or discredit the detective with his reports. (Transcripts of disbarment hearings: vol. III at 426-29, 444, 447, 454-56, 461-64, 470-71, 490-91, 494, 496-97, 518-19; vol. IV at 790, 801-06; vol. IV at 656-57, 663-66, 697; vol. III at 316-19; vol. IV at 671, 674; vol. IX at 1735, 1739, 1749)

the FBI. (*Id.*) Consequently, the issue never came up during the judge's deposition.

Four months after the partial deposition of the judge, the state bar disclosed sixty-three pages of FBI reports. (R.s.b. H) Included was the four-page report of Agent Goodman documenting his meeting with the judge on April 6, 1998. (R. app. H) Shortly after this disclosure, the state bar embarked on an effort to prevent the completion of Judge Nichols' deposition and to preclude his testimony at the disbarment hearing. (R.s.b. B at 3-4; and C at 7-9)

When petitioner sought to reschedule the judge's deposition, the state bar refused. He filed a motion with the hearing officer to complete the judge's deposition. (R.s.b. A at 3-4) The state bar opposed, arguing Judge Nichols' testimony was not legally relevant and that the judge should not testify at the disbarment hearing. (R.s.b. B at 7-9; R.s.b. C at 8-10)

The hearing officer sided with the bar, ruling that petitioner would not be permitted to call the judge as a witness and that the judge's testimony was not legally relevant. (R.s.b. E at 3) In his order, the hearing officer assured petitioner that "any findings made by Judge Nichols regarding (petitioner's) conduct will not be admissible. The hearing officer will make his own determination based on the evidence." (*Id.*)

C.

The trial in petitioner's disciplinary case commenced June 18, 2001, and with various recesses concluded on August 30, 2001. On the final day of hearing, petitioner rested his case and made an offer of proof as to portions of the judge's incomplete deposition. (R.s.b. F) Petitioner renewed earlier arguments that Judge Nichols should have been allowed as a witness, further arguing that it was fundamentally unfair to deny him the right to call the judge as a witness. (*Id.* at 1883-1889)

To the surprise of petitioner, the hearing officer partially reversed himself on this issue. (*Id.* at 1895) He ruled that selective portions of the judge's incomplete deposition would now be admitted, still emphasizing he would make his own determination "irrespective of Judge Nichols' opinion." (*Id.*)

On July 1, 2002, the hearing officer filed his report and recommendation. (App. C) Contrary to his express statements that the

judge's findings and opinions would not affect his determination, the hearing officer placed great weight and reliance upon the judge's misconduct findings and partial deposition testimony in determining the crucial question of petitioner's mental state. (*Id.* at 15-17) At the time of his decision, the hearing officer was *unaware* of the judge's *ex parte* meeting with the FBI.[4]

Petitioner filed his notice of appeal two days later. Because the hearing officer's reliance on the judge as the cornerstone of his opinion was now clear, petitioner revisited the FBI reports learning for the first time the timing of the agent's *ex parte* contact with the judge. (R. app. G at 21) Those reports were not in petitioner's possession at the time of the judge's partial deposition (*Id.* 21-22) and, when disclosed by bar counsel months later, were unimportant as the state bar by then had convinced the hearing officer to keep the judge off the stand. (R.s.b. E at 3)

The implications of the judge meeting secretly with the FBI to be persuaded of petitioner's misconduct and then shortly after finding, not coincidentally, the very same misconduct were obvious. The record on these matters was then supplemented before the disciplinary commission. (R.s.b. G)

D.

In briefs filed with the disciplinary commission, petitioner raised due process objections to the hearing officer's reliance upon the superior court judge's findings and partial deposition testimony. (R. Opening Brief at 34-36; R. Supp. Brief at 1-7) First, petitioner argued that the proceedings before Judge Nichols had violated a fundamental component of due process requiring that the judge be impartial and free of bias and prejudice. (R. Supp. Brief at 1-7) From this, petitioner argued that the tainted nature of the judge's findings and testimony infected the hearing officer's own findings which adopted verbatim those of the judge, thereby creating a due process violation. (*Id.*) Secondly, petitioner argued that his due process rights were violated where the hearing officer denied him the right to question the judge at the hearing and then later, despite assurances to the contrary, adopted the

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[4]The only evidence before the hearing officer regarding the judge's meeting with the FBI was the incomplete deposition of the judge.

judge's misconduct findings and opinion testimony as his own. (R. Opening Brief at 34-36) The disciplinary commission failed to address any of these due process contentions in its fourteen-page opinion. (App. B)

The Arizona Supreme Court accepted review of petitioner's case. (App. A) In briefs filed before that court, petitioner again raised the twin due process violations stemming from the taint of the judge's *ex parte* meeting with the FBI and the hearing officer's refusal to allow petitioner to question and cross examine the judge at the disbarment hearing. (R. Supp. Brief at 1-14) The Arizona Supreme Court considered the due process arguments but denied them. *In re Peasley*, ____ Ariz. ____, 90 P.3d 764, 770-772 (Ariz. 2004). (App. A at 9-11) That court held that the hearing officer had not relied on Judge Nichols' findings in reaching his own conclusions, *Id.* at 771, (App. A. at 10) and that, in any event, "no due process violation occurred because the record contains other evidence that supports the finding that Peasley acted intentionally". *Id.* at 772. (App. A at 11) In this regard, the court noted that petitioner had testified before a state grand jury acknowledging the detective's testimony was false. *Id.* (App. A at 11) The court failed to mention that petitioner's grand jury testimony was that his questioning of the detective had resulted from negligence and mistakes rather than an intent to elicit false testimony. (Resp. Exh. 38 at 59, 60, 62, 71, 72, 80, 82, 99, 100, 105 and 125) Finally, in a footnote to its opinion, the court held it was unnecessary for petitioner to call Judge Nichols as a witness. *Id.* at 772 n. 14. (App. A at 11)

REASONS FOR GRANTING THE WRIT

This Court long ago decided that disbarment proceedings "are adversary proceedings of a quasi-criminal nature," *In re Ruffalo*, 390 U.S. 544, 551 (1968), and that "the requirements of procedural due process must be met before a State can exclude a person from practicing law." *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963). This Court also long ago decided that "the due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), and that this guarantee was so essential that its violation required a new hearing "no matter how strong the evidence against (the accused)." *Edwards v. Balisok*, 520 U.S. 641, 647 (1997). Finally, this Court long

ago decided that a lawyer's right to procedural due process "often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." *Willner,* 373 U.S. at 103.

In the present case, the Arizona Supreme Court decided important federal questions involved in petitioner's disbarment in a way that conflicts with the foregoing relevant decisions of this Court and for that reason review should be granted. This Court has not hesitated to grant the writ in bar disciplinary proceedings where, as here, important questions of federal constitutional law are raised. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Association*, 439 U.S. 883 (1978); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). So, too, in petitioner's case the writ should be granted.

I.

The Fourteenth Amendment due process right to adjudication by an impartial tribunal requires petitioner receive a new disbarment hearing without regard to the evidence presented against him at his first hearing.

In *Marshall v. Jerrico, Inc., supra,* this Court fully articulated the basis for the due process guarantee of impartiality by the tribunal:

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. (Citations omitted). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. (Citations omitted). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' (citations omitted) by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his

case with assurance that the arbiter is not predisposed to find against him."

Marshall, 446 U.S. at 242.

This Court has consistently applied the due process guarantee of a fair adjudicative procedure in a variety of situations. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law"); *Ward v. Village of Monroeville*, 409 U.S. 57, 59 (1972) (due process violated where a judge presides over a case in which it would be in his financial interest to find against one of the parties); *Johnson v. Mississippi*, 403 U.S. 212, 215-216 (1971) (due process violated by a judge presiding over a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899, 905 (1997) (due process violated where a judge was disposed to rule against a party who did not bribe him in order to cover up the fact that he regularly ruled in favor of a party who did bribe him); *In re Murchison*, 349 U.S. 133, 137-139 (1955) (due process violated by a judge presiding over a criminal trial of a defendant who he had indicted under the state's one man grand jury procedure).

The due process right to an impartial and disinterested tribunal is so fundamental that where a violation of that right has occurred a new trial must be granted no matter how strong the evidence against him. *Tumey*, 273 U.S. at 535. In short, this means that the harmless-error doctrine does not apply where the constitutional error is an adjudication by a biased tribunal. *Edwards*, 520 U.S. at 647 ("[a] criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him"); *Rose v. Clark*, 478 U.S. 570, 577 (1986); *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991) (a proceeding before a judge who was not impartial constitutes a "structural defect in the constitution of the trial mechanism, which defies analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by . . the presence on the bench of a judge who is not impartial").

The judge's *ex parte* meeting with an FBI agent in his chambers

to discuss petitioner's alleged misconduct in a murder case over which the judge presided was improper. *See* Rule 81, Arizona Rules of the Supreme Court, Arizona Code of Judicial Conduct, Canon 3(B)(7), mandates that "a judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding". The impropriety of Judge Nichols secretly meeting with the FBI rose to a due process violation when, a few months later, that judge presided over a hearing to determine claims of petitioner's misconduct and at the conclusion of that hearing found the very misconduct which the FBI had urged him to find. (App. D)

Certainly, there is a serious question as to whether Judge Nichols was impartial and free of bias as a result of the *ex parte* influence created by his meeting with the FBI agent. The judge's misconduct finding and conclusion that petitioner's questioning of the detective was "not merely a result of legal error, negligence, mistake or insignificant impropriety" became the finding of the hearing officer and the cornerstone to his conclusion regarding petitioner's mental state. (App. C at 15-17) As such, the taint of *ex parte* influence infected, albeit unwittingly, the hearing officer's findings thereby violating petitioner's rights to due process of law.

Ruffalo is analogous. There, the petitioner attorney had been suspended from the practice of law by the Supreme Court of Ohio based on findings of alleged misconduct that were tainted by lack of notice as required by due process. Thereafter, the federal district court and the Sixth Circuit Court of Appeals initiated proceedings to determine if the attorney should be disbarred from practicing in federal court and the hearing in federal court rested exclusively on the Ohio Supreme Court's tainted record and findings. On *certiorari* to this Court, the question was "whether the defective notice in petitioner's state disbarment proceeding so infected that federal proceeding that justice requires reversal of the federal determination". *Ruffalo*, 390 U.S. at 552-553 (White, J., concurring). The court held that because the attorney's Ohio disbarment procedure had been lacking in due process, that the disbarment in the federal courts must be set aside. *Id.* at 551-552. Similarly, in the present case, the due process violation created by Judge Nichols so infected the hearing officer's determination in the disbarment

proceedings that petitioner was denied due process.

The Arizona Supreme Court's opinion in petitioner's case is flawed, on due process grounds, in two respects. First, the court concluded that the hearing officer's determination of petitioner's mental state was not affected or influenced by the findings of Judge Nichols and his opinion testimony offered at his incomplete deposition. *In re Peasley*, 90 P.3d at 771 (App. A at 9-10) This misreads the uncontradicted record which shows the hearing officer adopted verbatim the judge's findings and opinions regarding petitioner's mental state thereby rejecting his claim that his questioning of the detective resulted from negligence and mistakes rather than knowing design. (App. C at 15-17)

Secondly, and most importantly, the Arizona Supreme Court erred on due process grounds when it emphasized that "no due process violation occurred because the record contains other evidence that supports the finding that Peasley acted intentionally". *In re Peasley*, 90 P.3d at 772. (App. A at 11) This reference to "other evidence" is shorthand for harmless-error analysis which, as we have seen, is forbidden by this Court's cases where the due process violation is denial of an impartial and disinterested tribunal.

This Court should grant the writ and review petitioner's case which presents the most fundamental of due process deprivations requiring a new hearing where Judge Nichols either testifies or, alternatively, where his findings and opinions are not evidence for the fact-finder to rely on.

II.

The due process right to confront and cross examine that person whose word deprived petitioner of his livelihood was violated where petitioner's repeated requests to question Judge Nichols at the disbarment hearing were denied.

Due process in the quasi-criminal context of this disbarment proceeding mandated that petitioner be entitled to confront and cross examine that person "whose word deprived (him) of his livelihood." *Willner*, 373 U.S. at 103. Because four of the five counts of the state bar's complaint against petitioner involved proceedings presided over by Judge Nichols, he was a logical witness and certainly someone whose

word may lead to disbarment. This was all the more so because the state bar had quoted verbatim the judge's misconduct finding in the penultimate paragraph of its complaint.

Petitioner took the judge's partial deposition limiting some of his testimony. Part of his testimony was damaging, however, especially where the judge commented on petitioner's position that his disclosure of the detective's reports to defense counsel made it unlikely he had engaged in a knowing deception. The judge made reference to a bench conference in one of the El Grande trials and testified that, in effect, he did not believe petitioner or accept his position that he had not knowingly deceived. (App. C at 15-16) Needless to say, at the time of that deposition petitioner was unaware of the timing of Judge Nichols *ex parte* meeting with the FBI and the implications of that. For that reason, the judge was neither confronted nor cross examined at his partial deposition about that obvious impropriety.

As the disbarment proceedings unfolded, the hearing officer sided with the state bar and refused petitioner's repeated requests to complete the judge's deposition and to subpoena him to the disbarment hearing. The hearing officer assured petitioner that the judge's testimony was unnecessary as "any findings made by Judge Nichols regarding (petitioner's) conduct will not be admissible." (R.s.b. E at 3) If matters had stood there, perhaps there would be no error.

Yet the hearing officer's report and recommendation of July 1, 2002, changed all of that. In short, in deciding the crucial question of whether petitioner had negligently and mistakenly questioned his detective or whether the questioning had been by design to elicit falsehoods, the hearing officer quoted verbatim from Judge Nichols' July 31, 1998, order finding misconduct and specifically concluding that petitioner's actions "were not merely the result of legal error, negligence, or mistake or insignificant impropriety." (App. C at 15-17) The nub of petitioner's defense at the disbarment hearing was that he had disclosed the truth contained in his detective's reports to five different defense lawyers who had also negligently failed to appreciate the inconsistency and impeach the detective with his reports. Pointing to his disclosure of the truth, petitioner argued that one bent on deception would hardly first reveal the truth to his adversary and then knowingly present false testimony to the contrary. In rejecting

petitioner's position that his mental state was one of negligence rather than knowing deception, the hearing officer adopted verbatim, as his own finding of fact, the opinion testimony given by Judge Nichols in his partial deposition where the judge had rejected that claim. (App. C at 15-16)

Given the paramount importance of Judge Nichols to the hearing officer's decision regarding petitioner's mental state, there can be little doubt that it was the judge's word that deprived petitioner of his livelihood despite not affording petitioner a full and complete opportunity to confront and cross examine the judge as a witness. Surely, if the judge had testified at petitioner's disbarment hearing, the undersigned by then in possession of the FBI reports, would have impeached and discredited the judge's findings and testimony by his obvious bias and prejudice. The potential impact of such a line of cross examination upon the hearing officer's decision cannot be known for sure. At the very least, one can reasonably conclude that the hearing officer would have been struck by the unfairness and impropriety of the judge's meeting with the FBI prior to the July 31, 1998, hearing and finding of misconduct. A reasonable hearing officer may then have questioned the legitimacy of the judge's findings and opinion testimony and have rethought his reliance upon Judge Nichols in determining the crucial issue of petitioner's mental state.

The Arizona Supreme Court afforded footnote treatment to this issue, stating only that "because there were other reasonable available ways to establish Peasley's state of mind, calling Judge Nichols as a witness was unnecessary." *In re Peasley*, 90 P.3d at 772 n. 14. (App. A at 11) That holding misconstrues the very fabric of the hearing officer's decision because it was the hearing officer who used Judge Nichols to establish petitioner's state of mind. Having done so, despite assurances to the contrary, it then became incumbent that petitioner be entitled to confront and cross examine the judge on all areas to include the question of the impropriety of his *ex parte* meeting with the FBI.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests the Court grant his petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 25th day of August, 2004.

WATERFALL, ECONOMIDIS, CALDWELL, HANSHAW & VILLAMANA, P.C.

By _____
James W. Stuehringer
Attorneys for Petitioner

APPENDIX A

SUPREME COURT OF ARIZONA
En Banc

In the Matter of	)	Arizona Supreme Court
	)	No. SB-03-0015-D
KENNETH J. PEASLEY,	)	
Attorney No. 004114	)	Disciplinary Commission
	)	No. 97-1909
Respondent.	)	
	)	**OPINION**

Review from Disciplinary Commission
No. 97-1909

RESPONDENT DISBARRED

State Bar of Arizona
By: Karen A. Clark, Senior Bar Counsel Attorney for State Bar of Arizona
Waterfall, Economidis, Caldwell, Hanshaw& Villamana, P.C.
By: James W. Stuehringer
Attorneys for Kenneth J. Peasley

R Y A N, Justice

¶1 In this lawyer disciplinary case, the State Bar filed a complaint charging Respondent Kenneth J. Peasley with misconduct in violation of the Arizona Rules of Professional Conduct. The charges alleged that Peasley intentionally presented false testimony in the prosecution of two capital murder defendants. After lengthy proceedings, the hearing officer found by clear and convincing evidence that Peasley intentionally violated the ethical rules. Based upon the presence of mitigating factors, the hearing officer recommended a sixty-day suspension along with one year of probation.

¶2 Upon review, the Disciplinary Commission adopted and incorporated the hearing officer's findings, but reached a different conclusion about various aggravating and mitigating factors. The Commission recommended disbarment. Peasley petitioned this court for

review, which we granted because this is a matter of first impression in Arizona and of statewide importance. We have jurisdiction under Article 6, Sections 5(4) and 5(5), of the Arizona Constitution and Arizona Rule of the Supreme Court 59(a).

I.

A.

¶3 The record before the hearing officer established the following facts.[1] Peasley was admitted to the State Bar of Arizona on April 26, 1975. He started his career in the Pima County Public Defender's Office, but in January 1978 he began working as a prosecutor in the Pima County Attorney's Office. By 1992, Peasley had conducted approximately 250 felony trials, 140 of which were homicide cases. Of the homicide trials, about sixty were capital cases.

¶4 On June 24, 1992, three people were murdered during a robbery of the El Grande Market in Tucson. The lead detective in the El Grande murder case was Joseph Godoy. Detective Godoy had been with the Tucson Police Department for twelve years and had worked in homicide for several years before the El Grande murders. Peasley was the issuing attorney in the El Grande homicides, which meant that he went to the crime scene, received all the police reports, and decided who would be charged and with what crimes they would be charged. Godoy and Peasley were good friends.

¶5 On August 26, 1992, an attempted robbery and shootout occurred at a pizza restaurant in Tucson. Although another detective was assigned to this case, the names of the eventual defendants in the El Grande case arose in connection with the investigation of the pizza restaurant case. Those suspects were Martin Soto-Fong, Andre Minnitt, and Christopher McCrimmon.

¶6 On August 31, Detective Godoy received information from an anonymous source that a Martin Soto was involved in the El Grande murders. That same day, Mr. Gee, the owner of the El Grande Market, told Godoy that a Martin Fong was a former employee. Also, on August 31, another detective told Godoy that one of his informants implicated "ChaChi"and Christopher McCrimmon in the El Grande murders. That

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[1]We review the hearing officer's findings of fact for clear error. Ariz. R. Sup. Ct. 59(b).

evening, Godoy determined that "ChaChi," Martin Fong, and Martin Soto were names used by Martin Soto-Fong. In addition, on September 1, a Tucson Police Department fingerprint comparison report was completed, listing McCrimmon and Minnitt as suspects. The report identified McCrimmon's fingerprints as those found on a car near the El Grande Market. On September 2, Godoy assisted in arresting both McCrimmon and Minnitt for the robbery of the pizza restaurant. At that time, Godoy also interviewed both of them about the El Grande case.

¶7 Godoy subsequently wrote two police reports that reflected what he had learned during late August and early September in his investigation of the El Grande murder case. Specifically, those reports established that, before September 8, Godoy knew that Soto-Fong, McCrimmon, and Minnitt were the primary suspects.

¶8 On September 8, Detective Godoy interviewed an informant by the name of Keith Woods. The first part of the interview was not recorded. In the recorded portion, Woods stated that both Minnitt and McCrimmon had confessed to him that they and Soto-Fong had committed the El Grande murders. Eventually, Soto-Fong, Minnitt, and McCrimmon were charged with the murders. Peasley assumed responsibility for prosecuting the cases.

B.

¶9 Peasley prosecuted Soto-Fong first in 1993. Although the State Bar did not allege any misconduct in connection with the Soto-Fong trial, the hearing officer referred to that trial because it revealed Peasley's knowledge of when Detective Godoy knew the identities of the suspects involved in the El Grande case. First, Peasley admitted reading Godoy's reports before the Soto-Fong trial and thus knew that Godoy considered McCrimmon and Minnitt as suspects before September 8. Second, Peasley was present at Soto-Fong's counsel's interview of Godoy, during which the timing of Godoy's investigation was discussed. Finally, at Soto-Fong's trial Peasley questioned Godoy about when he first met with Mr. Gee. Godoy responded by telling the jury that he met with Mr. Gee during "the first week [of] September," when "Mr. Soto-Fong became a focus of the case." Soto-Fong was convicted and sentenced to death. State v. *Soto-Fong,* 187 Ariz. 186, 191, 928 P.2d 610, 615 (1996).

¶10 Less than a month after the Soto-Fong trial ended, the case against McCrimmon and Minnitt went to trial before a jury. Keith Woods

was a key witness for the state in the joint trial of Minnitt and McCrimmon because no direct evidence linked them to the crime.[2] However, Woods was a highly impeachable witness because he was a drug addict with multiple felony convictions and agreed to testify to avoid prosecution and a potentially lengthy prison sentence on another charge. Consequently, for the jury to believe Woods, it was important that there be no suggestion that Godoy told Woods that McCrimmon and Minnitt had been involved in the El Grande murders

¶11 To ensure that the jury believed Woods, Peasley, along with Godoy, engaged in the following conduct. First, in his opening statement, Peasley told the jury that Detective Godoy did not learn of McCrimmon, Minnitt, or Soto-Fong before the Woods interview and that Godoy did not know Soto-Fong was a former employee of the El Grande Market before he interviewed Woods. This statement implied to the jury that Godoy could not have told Woods who the suspects were when Godoy interviewed Woods on September 8.

¶12 Second, Detective Godoy, when questioned by Peasley, testified that he was not personally aware that one of the participants in the murder was a former employee until after he interviewed Woods and that McCrimmon and Minnitt were not suspects before the Woods interview.[3] During a bench conference, Peasley also told the judge that Godoy did not begin investigating McCrimmon, Minnitt, or Soto-Fong until after the Woods interview. Finally, in his closing argument, Peasley argued to the jury that Godoy did not know until the Woods interview that a former employee was involved in the murders.

¶13 The jury convicted McCrimmon and Minnitt and they were sentenced to death. Their convictions were reversed for reasons unrelated to this matter. State v. *McCrimmon,* 187 Ariz. 169, 174, 927 P.2d 1298, 1303 (1996).

¶14 After Minnitt's and McCrimmon's convictions were reversed, the

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[2]Peasley did not call Woods to testify at the Soto-Fong trial because Soto-Fong did not confess to Woods and because Soto-Fong's fingerprints were found at the scene.

[3] Both defense attorneys had copies of Godoy's reports, yet failed to impeach Godoy about what he knew before the Woods interview.

cases were severed and Minnitt was retried in 1997 before a different judge, Judge Richard Nichols. During this trial, when questioned by Peasley, Detective Godoy again testified that he had not come up with the names Chris McCrimmon, Andre Minnitt, "ChaChi," Martin Fong, or Martin Soto before speaking with Woods on September 8. He emphasized that the first time he had heard those names was during that interview. In response to further questions by Peasley, Godoy also testified that he had not submitted any of the defendants' fingerprints for comparison before he interviewed Woods and that Minnitt and McCrimmon were not suspects until he had spoken with Woods. In his final argument, Peasley again argued that Godoy did not have Minnitt's name until after he had interviewed Woods. The retrial ended in a mistrial because the jury could not reach a verdict.

¶15 McCrimmon's defense attorney had been present during the Minnitt retrial and discovered that Peasley had introduced false testimony. During McCrimmon's second trial, which began shortly after the conclusion of Minnitt's retrial, Detective Godoy answered Peasley's questions differently than he had in the prior trials. For example, he testified that he had submitted the fingerprints before the Woods interview and that he had known the defendants' names on September 1, 1992. Defense counsel impeached Godoy with his prior testimony. In his closing argument, Peasley explained that Godoy answered the way he did in the earlier trials to protect confidential sources and avoid a mistrial. He also argued it was a "sick system" that put an officer in a position in which he had to answer the way Godoy had answered. The jury acquitted McCrimmon.

¶16 After McCrimmon's acquittal, in anticipation of a third trial, Minnitt's defense counsel filed a motion that alleged Peasley engaged in prosecutorial misconduct in the prior trial and urged the court to dismiss on the grounds of double jeopardy. Judge Nichols denied the motion but made findings about Peasley's conduct in the Minnitt retrial. He found misconduct on Peasley's part and that it was "not merely a result of legal error, negligence, or mistake or insignificant impropriety." Judge Nichols, however, did not find that the "conduct was engaged in with the intent to further an improper purpose."

¶17 Minnitt was subsequently convicted and again sentenced to death.[4] But his conviction was overturned by this court on double jeopardy grounds. We held that the third trial should have been barred on double jeopardy grounds because of prosecutorial misconduct in the first two trials. State v. *Minnitt,* 203 Ariz. 431, 440, § 44-45, 55 P.3d 774, 783 (2002).[5]

C.

¶18 The State Bar eventually charged Peasley with five counts of misconduct. The hearing officer found the bar had proven by clear and convincing evidence two counts of misconduct, one count for the 1993 joint trial and one for the 1997 Minnitt retrial. He found that Peasley intentionally violated Arizona Rule of the Supreme Court 42, Ethical Rule ("E.R.") 3.3(a)(4)[6] (candor toward the tribunal), E.R. 4.1(a) (false statement of material fact or law), E.R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and E.R. 8.4(d)(conduct prejudicial to the administration of justice).[7] The hearing officer referred to the *American Bar Association Standards for Imposing Lawyer Sanctions ("Standards")* (1992) to determine the appropriate sanction. See, e.g., *In re Shannon,* 179 Ariz. 52, 68, 876 P.2d 548, 564(1994) (stating that "[w]e look to the American Bar Association's *Standards for Imposing Lawyer Sanctions*. for guidance in determining

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[4]Peasley was not the prosecutor for the third trial.

[5]The *Minnitt* opinion was published after the hearing officer made his decision in Peasley's disciplinary case but before the Commission reviewed the hearing officer's decision. The Commission took judicial notice of the *Minnitt* decision and noted that it was consistent with the hearing officer's determination that Peasley acted intentionally.

[6]Ethical Rule 3.3(a)(4) was renumbered and is now found at Ethical Rule 3.3(a)(3).

[7]The Arizona Rules of Professional Conduct were amended on December 1, 2003. Peasley was disciplined under the Ethical Rules in effect before the amendment. We note that the Ethical Rules relating to both infractions remained substantially unchanged.

the appropriate sanction to impose" (citing In *re Tarletz,* 163 Ariz. 548, 554, 789 P.2d 1049, 1055 (1990)).

¶19 Under the *Standards,* consideration is given to the following factors: 1) the duty violated; 2) the lawyer's mental state; 3) the actual or potential injury caused by the misconduct; and 4) the existence of aggravating and mitigating factors. *Standard* 3.0.

¶20 The hearing officer found that Peasley violated his duty as a prosecutor to the public and the court, and his responsibilities as a professional. He further concluded that "Respondent was either oblivious to his obligations or intentionally disregarded them. Respondent acted intentionally." The hearing officer also found that Peasley's conduct caused potential injury, in that the death penalty was sought against both Minnitt and McCrimmon.

¶21 The hearing officer next considered whether any aggravating and mitigating factors existed. *Standard 3.0(d); In* re Augenstein, 178 Ariz. 133, 136, 871 P.2d 254, 257 (1994). He found only one aggravating factor: substantial experience in the practice of law. *See Standard* 9.22(i). He found the following mitigating factors: absence of a prior disciplinary record, see *Standard* 9.32(a); cooperative attitude toward disciplinary proceedings, see *Standard* 9.32(e); good character or reputation, see *Standard* 9.32(g); physical or mental disability or impairment (only as to the 1997 Minnitt retrial), *see Standard* 9.32(h); delay in disciplinary proceedings, see *Standard* 9.32(j); and interim rehabilitation.[8] The hearing officer then conducted a proportionality analysis. Although acknowledging that the presumptive sanction for the type of misconduct Peasley committed is disbarment, *see Standard*

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[8]The *Standards* were amended and renumbered in 1992 and interim rehabilitation, which used to be *Standard* 9.32(j), was removed as a mitigating factor. Nevertheless, the hearing officer relied on this factor in mitigation.

6.11,[9] the hearing officer found that the mitigating factors supported a recommendation that Peasley be suspended for sixty days. He also recommended that Peasley be placed on probation for one year and pay costs.

D.

¶22 On review, the Disciplinary Commission adopted the hearing officer's findings of fact and conclusions of law but viewed the aggravating and mitigating factors differently.[10] It agreed that substantial experience in the practice of law was an aggravating factor, *see Standard* 9.22(i), but noted this factor was "particularly aggravating given that Respondent is a seasoned prosecutor with over 25 years of experience." The Commission also found two additional aggravating factors: dishonest or selfish motive, see *Standard* 9.22(b); and multiple offenses, see *Standard* 9.22(d). It agreed with the following three mitigating factors found by the hearing officer: absence of a prior disciplinary record, *see Standard* 9.32(a); full and free disclosure to disciplinary board or cooperative attitude toward proceeding, see *Standard* 9.32(e); and good character and reputation, see *Standard* 9.32(g). The Commission disagreed with the finding of physical or mental disability or impairment, see *Standard* 9.32(h); delay in disciplinary proceedings, see *Standard* 9.32(j); and interim rehabilitation.[11] After conducting a proportionality analysis, the Commission recommended disbarment.

II.

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[9]*Standard* 6.11 provides as follows:

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

[10]The Disciplinary Commission reviews questions of law de novo and defers to the hearing officer's findings of fact unless they are clearly erroneous. Ariz. R. Sup. Ct. 58(b).

[11]11.Former Standard 9.32(j).

¶23 Our task in reviewing a lawyer disciplinary proceeding is to "examine the facts to determine if the evidence supports the factual findings made by the hearing officer and the Commission, as well as to decide on the appropriate sanction, if any." *In re Walker,* 200 Ariz. 155, 160, ¶ 20, 24 P.3d 602, 607(2001). In conducting this review, "we give `deference and serious consideration' to the recommendations of the hearing officer and the Commission." *Id.* (citing *In* re Curtis, 184 Ariz. 256, 261, 908 P.2d 472, 477 (1995)). However, "the responsibility to decide upon the appropriate sanction in a disciplinary proceeding is ultimately ours." *Id.* We also look to the *Standards* for guidance in deciding the proper disciplinary measures. *In re Scholl,* 200 Ariz. 222, 224, ¶ 9, 25 P.3d 710, 712 (2001).

¶24 Although Peasley raised numerous issues in his original petition for review, his contentions can be distilled to two: 1) whether Peasley was denied due process, and 2) whether the Commission's recommendation that Peasley be disbarred is supported by the record. We turn first to Peasley's contention that he was denied due process.

A.

¶25 Peasley argues that the hearing officer violated his due process rights when he "adopted" the findings made by Judge Nichols and referred to Judge Nichols' testimony from an incomplete deposition. Specifically, he asserts that 1) Judge Nichols' findings were tainted by the influence of an ex parte meeting with an FBI agent; 2) the hearing officer denied Peasley's request to complete Judge Nichols' deposition or to call him at the hearing; and 3) the hearing officer stated that he would not rely on Judge Nichols' findings but then relied on them. As a consequence, Peasley contends that the hearing officer's finding that he intentionally presented false testimony was clearly erroneous. For those reasons, he requests a new hearing.

¶26 "[P]rocedural due process in attorney disciplinary proceedings include[s] fair notice of the charges made and an opportunity for the accused to provide an explanation and present a defense." *Walker,* 200 Ariz. at 158, ¶ 13, 24 P.3d at 605 (citing *In re Brady,* 186 Ariz. 370, 373, 923 P.2d 836, 839 (1996)). After reviewing the record, we conclude that Peasley has not established that he was denied due process in these proceedings.

¶27 During the preparation for the hearing before the hearing officer, Peasley noticed Judge Nichols as a witness. He wanted Judge Nichols' testimony because Judge Nichols had found that Peasley's misconduct was not committed "with the intent to further an improper purpose." Peasley consequently deposed Judge Nichols but was unable to finish because of Judge Nichols' schedule. At the disciplinary hearing, Peasley attempted to call Judge Nichols as a witness or, in the alternative, complete his deposition. Bar counsel objected, and the hearing officer refused to permit Judge Nichols to appear or to permit Peasley to finish the deposition of Judge Nichols. The hearing officer, however, admitted portions of Judge Nichols' deposition but stated that he would not rely on the judge's opinion in making his decision. Nevertheless, the hearing officer quoted portions of Judge Nichols' findings in his report.

¶28 After the hearing officer issued his report, Peasley discovered that Judge Nichols had met with an FBI agent before the hearing on Minnitt's motion to dismiss.[12] The agent's report indicated that the agent expressed his opinion to Judge Nichols that Peasley had intentionally presented false testimony.[13] Because of these circumstances, Peasley argues that the hearing officer's reliance on Judge Nichols' findings taints the whole proceeding. We disagree for several reasons.

¶29 First, the hearing officer said that he would not rely on Judge Nichols' findings but that he would reach his own conclusions. No evidence suggests that the hearing officer did not reach his own conclusions. For example, Judge Nichols found that Peasley's misconduct was not committed "with the intent to further an improper purpose." In contrast, the hearing officer specifically found that Peasley acted intentionally. This finding contradicts Peasley's contention that Judge Nichols' findings influenced the hearing officer's decision.

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[12]Peasley received the FBI reports from the State Bar four months after he deposed Judge Nichols. But Peasley contends that he did not "revisit" those reports until after the hearing officer issued his decision.

[13]No explanation is given why Judge Nichols did not disclose this contact either before the hearing on the motion to dismiss or during his deposition in this proceeding.

¶30 Second, the hearing officer's reference to Judge Nichols' findings can be fairly understood to relate solely to what happened in the trial court, rather than as a basis for his findings. The hearing officer gave a very detailed description of all the proceedings, including those that occurred before Judge Nichols. That the hearing officer quoted some of Judge Nichols' findings does not establish that he relied on those findings in making his recommendation.[14]

¶31 Third, and most importantly, even if the hearing officer relied on Judge Nichols' findings, no due process violation occurred because the record contains other evidence that supports the finding that Peasley acted intentionally. Specifically, the misconduct in both the 1993 joint trial and the 1997 Minnitt retrial was identical. In addition, the Soto-Fong trial revealed that Peasley knew Godoy considered McCrimmon and Minnitt to be suspects in the El Grande murders before he had interviewed Woods. Further, after the misconduct had been discovered in 1997, a grand jury was convened to investigate Peasley and Godoy. Peasley admitted to the grand jury that Detective Godoy's testimony was in fact false. Consequently, the presentation of the false testimony in the 1993 Minnitt and McCrimmon joint trial and the 1997 Minnitt retrial could only have been intentional. Thus, the hearing officer's finding that Peasley acted intentionally is supported by evidence independent of any findings by Judge Nichols. Accordingly, we hold

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[14]A judge's findings in the underlying criminal case do not necessarily determine whether or not an ethical violation occurred. *Cf. In re Wolfram,* 174 Ariz. 49, 53, 847 P.2d 94, 98 (1993) (holding that a trial court's finding of ineffective assistance of counsel in a Rule 32 proceeding does not "necessarily equate" to a finding of "a violation of our ethical rules"). In addition, we also note that "[o]nly in the rarest of circumstances should a judge be called upon to give evidence as to matters upon which he has acted in a judicial capacity, and these occasions, we think, should be limited to instances in which there is no other reasonably available way to prove the facts sought to be established." State *ex rel. Carroll v.* Junker, 482 P.2d 775, 781 (Wash. 1971); *see also Phillips v. Clancy,* 152 Ariz. 415, 420-21, 733 P.2d 300, 305-06 (App. 1986) (holding that public policy militates against a judge testifying as an expert witness for one of the parties). Because there were other reasonably available ways to establish Peasley's state of mind, calling Judge Nichols as a witness was unnecessary.

that Peasley was not denied due process in this disciplinary hearing.

B.

¶32 As a result, we conclude that the hearing officer's factual findings are not clearly erroneous. The record clearly supports the finding that Peasley intentionally violated E.R.3.3(a) (3)(candor toward the tribuna!), E.R. 4.1(a)false statement of material fact or law), E.R. 8.4(c)(conduct involving dishonesty, fraud, deceit, or misrepresentation), and E.R. 8.4(d) (conduct prejudicial to the administration of justice). Because the record clearly and convincingly supports the finding that Peasley violated the ethical rules, we now must determine the appropriate sanction.

III.

¶33 As stated above, we apply the *Standards* when imposing attorney discipline. Shannon, 179 Ariz. at 68, 876 P.2d at 564. Like the hearing officer and the Commission, we consider the following factors: 1) the duty violated; 2) the lawyer's mental state; 3) the actual or potential injury caused by the misconduct; and 4) the existence of aggravating and mitigating factors. *Standard* 3.0. In addition, we consider other similar cases in determining whether a specific sanction is proportional. *In re Horwitz,* 180 Ariz. 20, 28, 881 P.2d 352,360 (1994). We address each of these considerations in turn.

A.

¶34 With respect to the first factor, Peasley violated his duty as a prosecutor to seek justice. "The prosecutor's interest in a criminal prosecution `is not that it shall win a case, but that justice shall be done.'" *Pool v. Superior* Court, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). In addition, courts generally recognize that the ethical rules impose high ethical standards on prosecutors.

> Recognizing a Government lawyer's role as a shepherd of justice, we must not forget that the authority of the Government lawyer does not arise from any *right* of the Government, but from *power* entrusted to the Government. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond

> calculation to our system of justice. This alone compels the responsible and ethical exercise of this power.

In re Doe, 801 F. Supp. 478, 480 (D.N.M. 1992). By presenting false testimony in the prosecution of two defendants charged with capital murder, Peasley violated one of the most important duties of a lawyer.

¶35 As to the second factor, the record clearly supports the finding that Peasley intentionally presented false testimony over the course of two trials. The record also supports the finding that the third factor, actual or potential harm, occurred here. Peasley sought and obtained the convictions and the death penalty against two capital murder defendants using false testimony to establish a crucial fact. Such harm is particularly egregious. See *In re Wolfram,* 174 Ariz. 49, 57,847 P.2d 94, 103 (1993). We cannot conceive of a more serious injury, not just to the defendants but to the criminal justice system, than a prosecutor's presentation of false testimony in a capital murder case.

¶36 The presumptive discipline for Peasley's intentional misconduct is disbarment. *Standard* 6.11. Thus, we must determine whether the aggravating factors, weighed against the mitigating factors, justify disbarment. We first address the aggravating factors. These factors need only be supported by reasonable evidence. In re *Varbel,* 182 Ariz. 451, 455 n.7, 897 P.2d 1337, 1341 n.7 (1995).

B.

1.

¶37 Both the hearing officer and the Commission found that substantial experience was an aggravating factor. The hearing officer did not give this factor any weight because he believed that it was offset by the corresponding mitigating factor of an unblemished disciplinary record. Prior decisions of this court support such an offset. *See, e.g., Shannon,* 179 Ariz. at 68, 876 P.2d at 564. But as *we* suggested in *In re Arrick,* 180 Ariz. 136, 143, 882 P.2d 943, 950 (1994), the aggravating factor of substantial experience in the practice of law deserves closer examination and should not simply be "offset" by a supposedly unblemished record. See *also Shannon,* 179 Ariz. at 82, 876 P.2d at 578 (Zlaket, J., dissenting)(arguing that "using the mitigating effect of . . . discipline-free years to `offset' the`substantial practice' aggravating factor. effectively accords equal weight to both").

¶38 One commentator suggests that "[t]he justifications for treating substantial experience in the practice of law as an aggravating factor are weak in many cases." Leslie C. Levin, *The Emperor's Clothes and Other Tales* About the *Standards for Imposing Lawyer Discipline Sanctions,* 48 Am. U. L. Rev. 1, 50 (1998). Further, "[t]he bar admission standards in every state require applicants to demonstrate knowledge of professional responsibility rules and admitted lawyers are bound to abide by the rules regardless of their level of experience." *Id.* Thus, merely because a lawyer has substantial experience in the practice of law should not mean that this aggravating factor automatically applies.

¶39 However, because "[t]here are, obviously, problems that more experienced lawyers may be better able to avoid than less experienced lawyers," there could "be cases in which the lawyer's substantial experience should be considered relevant to the sanction imposed." Id. at 52. We conclude that when there is a nexus between a lawyer's experience and the misconduct, substantial experience should be considered a relevant aggravating factor.

¶40 Peasley maintains that substantial experience should not be considered an aggravating factor in his case because dishonesty is not the type of misconduct that becomes less likely with years of experience. *See In re Savoy,* 181 Ariz. 368, 371, 891 P.2d 236, 239 (1995) (substantial experience "applies only when the misconduct would be less likely to occur the more experienced a lawyer becomes; but every lawyer is expected to be truthful, regardless of the length of time he has practiced"). Obviously, even the most inexperienced lawyer knows that he or she should not elicit false testimony. Nevertheless, when a lawyer's substantial experience places that lawyer in a position that would be unavailable to a less experienced lawyer, and that lawyer's experience also affords, or should afford, a greater appreciation of the advantages of eliciting false testimony, substantial experience may be considered a relevant aggravating factor.

¶41 Peasley's substantial experience as a prosecutor placed him in a different position than a prosecutor with less experience. First, because of his lengthy experience, Peasley had the ability to, and did, try the most serious of cases, capital murder cases. Second, as the issuing attorney in the El Grande case, Peasley had the authority to, and did, assume responsibility for prosecuting the case himself. More

importantly, because of his substantial experience, particularly in prosecuting homicide cases, Peasley understood far better than would an inexperienced prosecutor how a jury would likely react to a suggestion that Detective Godoy "fed" information about Minnitt and McCrimmon to Woods. Peasley would not have been prosecuting the El Grande murders but for his experience, and because of that experience, he recognized the significance of Godoy's testimony with respect to Woods' credibility. We therefore conclude that Peasley's substantial experience does carry weight as an aggravating factor.

2.

¶42 The Commission also found the additional aggravating factor of dishonest or selfish motive, which Peasley contests. We have held that dishonest or selfish motive "speaks in terms of `motive,' not conduct." Shannon, 179 Ariz. at 69, 876 P.2d at 565; *see also In re Attorney* D., 57 P.3d 395, 400 (Colo. 2002) ("'[T]he absence of a dishonest or selfish motive,'. refers to the lawyer's motive for his conduct, without regard to any awareness on his part whether that conduct is specifically proscribed as unethical. While not necessarily irrelevant, a respondent's awareness that his conduct will violate an ethical proscription is not itself material."). Simply because an attorney's conduct is intentional or dishonest does not by itself establish a dishonest or selfish motive. *See In re Alcorn*, 202 Ariz. 62, 74, ¶ 42, 41 P.3d 600, 612 (2002) (respondent violated his ethical duty of candor toward the tribunal, but selfish motive was not an aggravating factor).

¶43 In the past, we have held that dishonest or selfish motive is an aggravating factor when an attorney received some financial gain or made misrepresentations to cover his or her negligence. These previous holdings of dishonest or selfish motive involved private attorneys, not public sector lawyers. See, e.g., *Arrick*, 180 Ariz. at 143, 882 P.2d at 950 (holding that lawyer who made deliberate misrepresentations to his client to conceal his negligence and improperly retained a fee from that client had a dishonest or selfish motive); *Shannon*, 179 Ariz. at 69, 876 P.2d at 565 (finding lawyer who represented clients with conflicting interests did so for "selfish reasons"). We have never addressed a situation involving a prosecutor who was alleged to have had a dishonest or selfish motive.

¶44 Nevertheless, we believe there are instances in which the misconduct of a prosecutor can be prompted by a dishonest or selfish motive. Obtaining a conviction at any cost is one of them. Peasley intentionally and repeatedly presented false testimony in an effort to bolster Woods' credibility solely for the purpose of obtaining convictions and subsequent death penalties for both Minnitt and McCrimmon. In our view, such circumstances demonstrate a dishonest motive. *Cf. People v. Pautler*, 35 P.3d 571, 585-86 (Colo. 2001) (finding that prosecutor who misrepresented himself to a suspect as a public defender was motivated in part by gaining an advantage in subsequent legal proceedings, which supported the existence of the aggravating factor of dishonest or selfish motive). We therefore agree with the Commission that the aggravating factor of dishonest motive is present in this case.

3.

¶45 Peasley contests the Commission's finding of multiple offenses as an aggravating factor. This court has applied the aggravating factor of multiple offenses to a lawyer's misconduct that involved multiple clients or multiple matters. For example, we found multiple offenses when a lawyer violated duties owed to two clients, a former client, the court, and opposing parties in a one-year period. *See In re Moak*, 205 Ariz. 351, 356, ¶ 30, 71 P.3d 343, 348 (2003). We also found multiple offenses when a lawyer brought several frivolous claims against multiple defendants on behalf of one client. *In re Levine*, 174 Ariz. 146, 171, 847 P.2d 1093, 1118 (1993). But we do not think this aggravating factor is limited to such situations. *Cf. In re Rome*, 856 So. 2d 1167, 1169-71 (La. 2003) (upholding finding of multiple offenses when assistant district attorney kept fine payments for himself on six to eight occasions).

¶46 Here, Peasley presented misleading and false testimony in two separate trials against two defendants. In each trial, he referred to Godoy's false testimony in his opening statements, elicited the false testimony on direct examination of Godoy, and exploited that false testimony in his closing arguments. Furthermore, his conduct was more egregious in the second trial than in the first — his questions were more specific and pointed in eliciting the false testimony. We therefore agree with the Commission and conclude that Peasley committed multiple offenses, which we consider to be a very serious aggravating factor.

4.

¶47 Peasley claims that the Commission erred in finding, as a de facto aggravating factor, that he failed to demonstrate that recurrence was unlikely. The Commission found that Peasley's statement — that a "sick system" made Detective Godoy testify the way he did — suggested "the potential for future misconduct by Respondent, which places the public and criminal justice system at substantial risk." The Commission went on to state, "Given the seriousness of the misconduct and the significant injury it caused to the defendants and to the legal system, the Commission is convinced that the public and the criminal justice system will not be protected by anything less than disbarment."

¶48 We do not read the Commission as having treated the possibility of recurrence as an aggravating factor, but instead it simply considered that possibility in determining the appropriate sanction. We believe that such consideration was appropriate. "This court has long held that `the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice and not to punish the offender.'" *Alcorn,* 202 Ariz. at 74, ¶41,41 P.3d at 612 (citing *In* re *Kastensmith,* 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)); see *also Scholl,* 200 Ariz. at 227, ¶29,25 P.3d at 715("The purpose of professional discipline is twofold: (1) to protect the public, the legal profession, and the justice system, and (2) to deter others from engaging in misconduct.").

C.

¶49 We next examine the existence of mitigating factors. As discussed above, the hearing officer and the Commission reached different findings with respect to several of the mitigating factors. Because our review is de novo, see Moak, 205 Ariz. at 352, ¶ 5, 71 P.3d at 344, we examine these factors in detail.

1.

¶50 Both the hearing officer and the Commission found Peasley's unblemished disciplinary record to be a mitigating factor. This court has on occasion given great weight to an unblemished disciplinary record in determining the proper sanction for lawyer misconduct. *In re Murphy,* 188 Ariz. 375, 380, 936 P.2d 1269, 1274 (1997) ("[W]e are greatly influenced by the fact that in 26 years of practice, respondent has never before received a disciplinary complaint."); *Levine,* 174 Ariz. at 172,

847 P.2d at 1119 ("We give great weight, in particular, to respondent's previous unblemished disciplinary record as well as his professional contributions and accomplishments during his 30 years of practice.").

¶51 The Commission did not give this factor much weight and the State Bar encourages us to do the same. We agree that Peasley's unblemished disciplinary record should not be given great weight here. First, "the absence of a disciplinary record is not by itself proof of good conduct." Levin, supra, at 53-54. Second, although Peasley had not previously been formally disciplined by the State Bar, at least two reported decisions discuss Peasley's misconduct in the prosecution of those cases.[15]

¶52 This court commented on allegations of prosecutorial misconduct by Peasley in State v. *Rodriguez,* 192 Ariz. 58, 64, 19[31-33, 961 P.2d 1006, 1012 (1998) (Peasley violated the discovery rules, failing to ensure that the defendant received a fair trial), and State v. *Trostle,* 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997) (Peasley made inflammatory remarks about the defendant and made an impermissible comment on the defendant's failure to testify).[16] We acknowledge that these cases did not lead to Peasley being formally disciplined nor did Peasley's misconduct cause the convictions in those cases to be reversed.[17] Nevertheless, these cases demonstrate that his misconduct in

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[15]We do not rely on these decisions as aggravation, but we do consider them in deciding the weight to be given the mitigating factor of unblemished disciplinary record. *See Horwitz,* 180 Ariz. at 22 & n.3, 881 P.2d at 354 & n.3 (taking judicial notice of official court record in respondent's criminal trial); *In re Ronwin,* 139 Ariz. 576, 579-82, 680 P.2d 107, 110-13 (1983) (taking judicial notice of actions filed by bar candidate in federal court).

[16]These decisions do not specifically mention Peasley's name, but during his disciplinary hearing, Peasley conceded he was the prosecutor in those cases.

[17]In *Rodriguez,* the court commented on Peasley's misconduct, but remanded the case for a new trial on other grounds. 192 Ariz. at 64, ¶ 31, 961 P.2d at 1012. In *Trostle,* the court found the error to be harmless. 191 Ariz. at 16, 951 P.2d at 881 ("Any error was harmless beyond a reasonable doubt.").

this matter was not entirely out of character. For this reason, we decline to give the factor of unblemished disciplinary record much weight.

2.

¶53 Although the hearing officer found interim rehabilitation to be a mitigating factor, the Commission rejected this as a mitigating factor. Peasley argues that interim rehabilitation should be a mitigating factor because he had taken steps to reduce his workload and to prepare for trial more thoroughly. Interim rehabilitation is no longer a mitigating factor under the *Standards.* See *Standard* 9.32. But we may still consider this factor in mitigation because the purpose of attorney discipline is not to punish but rather to protect the public. *See Alcorn,* 202 Ariz. at 74, S 41, 41 P.3d at 612. Nevertheless, the facts do not indicate that overwork caused Peasley's misconduct. Neither Peasley nor the hearing officer points to any causal connection between Peasley's workload and his intentional presentation of false evidence. Thus, a reduced workload and additional preparation would not have prevented the misconduct that occurred here. Accordingly, we do not give this factor any weight.

3.

¶54 The Commission also rejected the hearing officer's finding of the mitigating factor of physical disability in the 1997 Minnitt retrial. Peasley argues that the Commission applied the wrong criteria in rejecting this factor. We agree. Referring to the "[four]-pronged criteria" of *Standard* 9.32(i),[18] the Commission rejected the mitigating factor of

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[18]These criteria are the following:

1. there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

2. the chemical dependency or mental disability caused the misconduct;

3. the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

4. the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

Standard 9.32(i).

physical disability in part because it concluded that Peasley "failed to demonstrate a sustained period of rehabilitation, and that a recurrence of the misconduct is unlikely." This reliance on a failure to demonstrate a sustained period of rehabilitation and the unlikelihood of recurrence was error. Such factors are only relevant when a lawyer claims mental disability or chemical dependency as a mitigating factor. *See Standard* 9.32(i). Peasley did not claim mental disability or chemical dependency. Instead, he contended that he suffered from a physical and medical disability "stemming from stress, overwork and ill health." *See Standard* 9.32(h). Nonetheless, we conclude that the evidence does not support this mitigating factor.

¶55 Physical disability is a mitigating factor only if there is a direct causal connection between the physical disability and the misconduct. *Standard* 9.32(h) & cmt. The stronger the connection between the disability and the misconduct, the greater the weight it must be given.[19]

¶56 Nothing in the record supports the finding that Peasley's physical disabilities caused his misconduct in the1997 Minnitt retrial. The hearing officer found that Peasley suffered from vision problems, pain on his left side, periodic vertigo, and had difficulty focusing and concentrating during the Minnitt retrial. Although the hearing officer found these conditions to be a mitigating factor, we do not. Peasley did not establish a causal relationship between his physical problems and his misconduct. Peasley's physical condition in 1997 does not explain his intentional misconduct in the Minnitt retrial. Thus, we reject the mitigating factor of physical impairment.

4.

¶57 Peasley also claims that his public and private humiliation should be considered in mitigation. Public and private humiliation is not listed as a mitigating factor in the *Standards,* but we previously have found

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[19]The commentary to *Standard* 9.32 states:

> Direct causation between the [physical] disability . . . and the offense must be established. If the offense is proven to be attributable solely to a disability . . . it should be given the greatest weight. If it is principally responsible for the offense, it should be given very great weight; and if it is a substantial contributing cause of the offense, it should be given great weight. In all other cases in which [it] is considered as mitigating, it should be given little weight.

humiliation to be a mitigating factor in certain circumstances. *See Walker*, 200 Ariz. at 161, ¶ 25, 24 P.3d at 608. Peasley relies on *Walker* for the proposition that because he suffered months of personal and public humiliation as a result of these proceedings, we should find mitigation.

¶58 The kind of humiliation this court examined in *Walker* was simply not the kind of humiliation that results from having one's misconduct subject to disciplinary proceedings. To the contrary, the humiliation discussed in *Walker* resulted from actions that occurred before the inception of disciplinary charges, not as a result of the disciplinary charges themselves. Specifically, Walker, after sexually harassing a client, was arrested in his office and taken to jail in handcuffs; the charges against him were made public by the local press; he was prosecuted for prostitution and sexual indecency; he entered a diversion program to avoid prosecution; and he was the subject of a malpractice suit. *Id.* We concluded that what happened to Walker was "sufficient deterrence to other attorneys." *Id.* Any humiliation that Peasley may have suffered was a result of these disciplinary proceedings, not because of other factors like those in *Walker*. Therefore, we decline to find the mitigating factor of public and personal humiliation in this case.

5.

¶59 Peasley contends that we should recognize the delay in disciplinary proceedings as a mitigating factor. *See Standard* 9.32(j). We agree significant delay occurred in this case.[20] It took almost two years for the State Bar to issue a probable cause order from the time the initial complaint was filed with the State Bar. The formal complaint was filed a year after the probable cause order was issued – although during that time the parties had engaged in negotiations. The hearing officer then issued his decision more than two years after the formal complaint was filed. Although not all of the delay was the State Bar's fault, that

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[20]The initial complaint was filed by McCrimmon's lawyer in September 1997. The State Bar did not forward the complaint to Peasley until March 1998. A probable cause order was not filed until May 1999. The formal complaint was finally filed in May2000. The hearings before the hearing officer were conducted from June 2001 through December 2001. The hearing officer issued his report on July 1, 2002.

delay negatively impacted Peasley.[21] Therefore, we consider the delay in this case to be a mitigating factor.

6.

¶60 Finally, with respect to the other mitigating factors, we agree with the hearing officer and the Commission that the evidence supports the mitigating factors of full and free disclosure to the disciplinary board or cooperative attitude toward the proceeding, *see Standard* 9.32(e), and good character and reputation, *see Standard* 9.32(g).

D.

¶61 The last step in determining if a particular sanction is appropriate is to assess whether the discipline is proportional to the discipline imposed in similar cases. *Alcorn,* 202 Ariz. at 76, I 49, 41 P.3d at 614; see also In re Wines, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983) (finding that while proportionality is appropriate, discipline is tailored to each individual case). We found no cases in Arizona or any other jurisdiction with a similar fact pattern. But in Arizona and other jurisdictions, disbarment or a lengthy suspension are proper only in the most serious of circumstances. For example, this court disbarred a lawyer for making false statements to clients about filing a lawsuit, preparing a false, backdated letter for the State Bar during its investigation, submitting a false affidavit to the bar, and lying under oath during the disciplinary proceedings. *In re Fresquez,* 162 Ariz. 328, 329-31, 335, 783 P.2d 774, 775-77, 781 (1989). We also ordered disbarment when a lawyer, among other things, failed to diligently and competently represent several clients in civil matters, made factual misrepresentations to the court, failed to communicate with his clients, and failed to cooperate with the State Bar's investigation. *In re Elowitz,* 177 Ariz. 240, 241, 243, 866 P.2d 1326, 1327, 1329 (1994). Finally, this court mandated a three-year suspension when a lawyer manufactured evidence, committed perjury, and suborned perjury during a State Bar investigation. *In re Fioramonti,* 176 Ariz. 182, 187-89, 859 P.2d 1315,

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[21]We recognize that part of the delay after the formal complaint was filed was either due to the complexity of the case or the result of Peasley's own litigation tactics.

1320-22 (1993).[22]

¶62 The Supreme Judicial Court of Maine upheld disbarment as the appropriate sanction when a defense attorney allowed his client to testify falsely at his criminal trial. *Board of Overseers v. Dineen,* 481 A.2d 499, 501 (Me. 1984). The court declared that "[t]here is no more egregious violation of a lawyer's duty as an officer of the court, and no clearer ethical breach" than deliberately eliciting false testimony from his client. *Id.* at 504.

¶63 The above cases indicate that disbarment in this case would be proportional to the discipline imposed in other cases involving serious misconduct.

IV.

¶64 As mentioned previously, "[t]he purposes of professional discipline are to protect the public, the legal profession, and the justice system, and to deter others from engaging in misconduct." *Horwitz,* 180 Ariz. at 28-29, 881 P.2d at 360-61 (citing *In re Neville,* 147 Ariz. 106, 116, 708 P.2d 1297, 1307 (1985), and *In re Swartz,* 141 Ariz. 266, 277, 686 P.2d 1236, 1247 (1984)). In addition, this court "must also try to instill public confidence in the bar's integrity." *Id.* at 29, 881 P.2d at 361 (citing *In* re Loftus, 171 Ariz. 672, 675, 832 P.2d 689, 692 (1992)).

¶65 Peasley's intentional elicitation of false testimony against two defendants in a capital murder trial in 1993, re-presentation of the same false testimony in the 1997 retrial of one of the defendants, and exploitation of that false testimony in the closing argument in both trials, could not have been more harmful to the justice system. The credibility of the criminal justice system relies heavily on the integrity of those who work in the system. Moreover, a prosecutor has the added duty to see

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[22] *Fioramonti* is distinguishable from the present case for two reasons. First, while Fioramonti's actions were egregious, no third party was harmed. 176 Ariz. at 188, 859 P.2d at 1321. Second, although disbarment was the presumptive sanction for Fioramonti's misconduct, he was suspended due to the existence of mitigating factors. *Id.* at 189, 859 P.2d at 1322.

that justice is done.[23] A prosecutor who deliberately presents false testimony, especially in a capital case, has caused incalculable injury to the integrity of the legal profession and the justice system. In such a circumstance, the public's interest in seeing that justice has been fairly administered has been violated in a most fundamental way. Peasley's misconduct has severely undermined the public's trust and confidence in Arizona's criminal justice system. Therefore, in this case, "[a]ny sanction less than disbarment would be an inappropriate statement of what the bar and this court should and would tolerate." *Id.*

¶66 In weighing the aggravating and mitigating circumstances, we determine that Peasley's multiple offenses and dishonest motive are exceptionally serious aggravators in this matter. As such, we conclude those factors outweigh the mitigating factors of significant delay, cooperative attitude toward the disciplinary proceeding, and good character and reputation. Thus, disbarment is required.

V.

¶67 Finally, Peasley raises several objections to the State Bar's Disciplinary Clerk's verified statement of costs and expenses. The statement asks for a total of $29,201.91.

¶68 An assessment of costs and expenses is one of the permissible sanctions in bar disciplinary proceedings. Ariz. R. Sup. Ct. 52(a)(8).[24] Rule 52(a) (8), in effect at the time of Peasley's proceedings, stated in part, the following:

> Misconduct shall be grounds for one or more of the following sanctions:
>
> . . .

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[23]See Ariz. R. Sup. Ct. 42, E.R. 3.8 cmt. ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

[24]The rule was substantially revised and renumbered, effective December 1, 2003. See Ariz. R. Sup. Ct. 60(b).

> Assessment of the costs and expenses of discipline proceedings, imposed by order of a hearing officer or the commission, and otherwise by judgment entered in this court upon a statement of costs and expenses filed with the disciplinary clerk. The state bar shall file with the disciplinary clerk a statement of costs and expenses on proven counts within seven (7) days after a hearing officer report is filed. Assessment, based upon the recommendation of the hearing officer, as affirmed or modified by the commission, including any costs and expenses of adjudication, shall be included in the order or judgment . . . .

A.

¶69 The procedural background of the requests for costs and expenses is as follows. The hearing officer issued his report on July 1, 2002, which ordered Peasley to pay costs and expenses. Within a week, the bar submitted its statement of costs and expenses requesting a total of $16,686.44. The hearing officer never ruled on the bar's request.

¶70 In its order, the Commission reduced the costs and expenses by $7330.24, which reflected the bar's expenses in using a computer program in preparation for the disciplinary hearing. Nevertheless, the verified statement filed by the Disciplinary Clerk with this court on October 10, 2003, included the expenses of the computer program, as well as additional costs and expenses of court reporters, for a total assessment of $29,201.91.

B.

¶71 Pointing to Rule 52(a) (8), Peasley first argues that he should be assessed only those costs and expenses incurred with respect to the proven counts. He contends that expenses involving certain witnesses and experts should not be assessed as these individuals "had nothing to do" with the proven counts. He suggests "a rational approach would be to deem that the state bar, having proven two of its five counts, established [forty percent] of its case." The bar therefore should be limited to recovering forty percent of its costs and expenses. The State Bar counters that none of the requested costs and expenses pertain solely to the unproven counts. We agree with the bar. The bulk of the bar's case involved the misconduct in the Minnitt and McCrimmon joint trial

and the Minnitt retrial. We consequently decline to reduce the costs and expenses to forty percent.

¶72 Citing Rule 46(g) (9),[25] which allows an assessment for expenses "necessarily incurred by the state bar and the disciplinary clerk's office," Peasley next argues that the expenses incurred for a computer program used by counsel for the bar were not necessary. The program was used to scan more than 4800 pages of the El Grande murder trial transcripts into a software program, which permitted bar counsel to search the transcripts by word and phrase. It also allowed counsel to project selected portions of the transcripts on a large screen to assist the witnesses and the hearing officer during the hearing. The Commission declined to assess these expenses against Peasley. From our review of the record, it does not appear that the computer program was particularly necessary for bar counsel to present her case. Accordingly, we agree with the Commission and conclude that the expenses of the computer program should not be assessed against Peasley.

¶73 Peasley also objects to an assessment of expenses for two experts the bar consulted in preparing the case for hearing. Because these experts were neither called nor disclosed, Peasley argues they were not "witnesses" as contemplated by Rule 46(g)(9) ("Expenses shall include, by way of illustration and not limitation, . . charges of expert witnesses . . . ."). The bar argues that the expenses it incurred in consulting with the experts were "justified." We are not persuaded. One of the experts, an attorney, advised bar counsel in connection with preparing the complaint, and the other, a doctor, was consulted concerning Peasley's medical condition in 1997, which was raised by him as a mitigating factor with respect to the 1997 retrials. Neither expert was noticed as a witness nor were any reports of those experts disclosed to Peasley. Accordingly, we agree with Peasley that he should not be assessed the expenses of the bar's consultation with these two experts.

¶74 Peasley next argues that he should not be assessed $10,853.92 in expenses for court reporters and transcripts. These expenses were added when the Disciplinary Clerk filed the verified statement of costs and expenses on October 10, 2003. Peasley contends that because these costs were not included in the State Bar's verified statement of July 8, 2002,

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[25]Current Rule 46(f)(12).

they were not timely requested. As quoted above, Rule 52(a)(8) requires the State Bar to file "a statement of costs and expenses on proven counts within seven (7) days after a hearing officer report is filed."

¶75 The bar argues that the total costs of court reporter services are not known until the case is transmitted to this court. It is at that time the transcripts are prepared, and thus, such "costs can be computed." But, the transcripts at issue here (with the exception of one) were filed and the accompanying invoices were submitted to the State Bar in 2000 and 2001. Thus, the necessary information to include nearly all of the costs of the court reporter services was available before the hearing officer issued his report in July 2002.[26]

¶76 Nevertheless, we believe that these costs should be assessed against Peasley. Rule 52(a) (8) provides that an assessment "be included in the order or judgment." Such an assessment shall include"any costs and expenses of adjudication." *Id.* Although the rule declares that the assessment be "based upon the recommendation of the hearing officer," the Commission has the authority to modify the recommendation. *Id.* Because the rule permits modification of any assessment recommended by the hearing officer and also requires that any final order or judgment include the assessment (including the "costs and expenses of adjudication"), we conclude that the additional expenses of the court reporting services can be assessed against Peasley.

¶77 As a final point, Peasley argues that "Rule 52(a)(8) contemplates that the assessment of costs and expenses be determined initially by the hearing officer," and because that did not occur in this case, the State Bar's request must be denied in its entirety. The bar responds that the rule permits the hearing officer or the Commission to assess costs and expenses. Indeed, Rule 52(a)(8) does provide for an "[a]ssessment of the costs and expenses of discipline proceedings, *imposed by order of a hearing officer or* the commission, and otherwise *by* judgment entered in this court upon a statement of costs *and expenses filed with* the *disciplinary clerk.*" (Emphasis added.) Although the rule is not a model

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[26]The only court reporter services that were not known at that time were the costs of such services for the proceedings before the Commission. The invoice for that transcript was received by the disciplinary clerk on December 2, 2002.

of clarity, it does contemplate an assessment of costs by the hearing officer, the Commission, or this court. Under Peasley's interpretation of the rule, the assessment of costs and expenses would be fixed at the conclusion of the hearings before the hearing officer.[27] If that were the case, no costs and expenses could ever be assessed for the costs of the proceedings before the Commission or this court. We do not think the rule intended such a result. Therefore, we reject Peasley's argument on this point.

VI.

¶78 Based on the foregoing, we order that Peasley be disbarred and that he be assessed costs and expenses consistent with this opinion.

Michael D. Ryan, Justice

CONCURRING:

Charles E. Jones, Chief Justice

Ruth V. McGregor, Vice Chief Justice

Rebecca White Berch, Justice

Andrew D. Hurwitz, Justice

[27] As noted in footnote 20, the rule with respect to the assessment of costs and expenses has been amended. See Ariz. R. Sup. Ct. 60(b). The amended rule provides that such an assessment will occur upon the completion of the disciplinary proceedings, whether that occurs upon final order of the hearing officer, the Commission, or this court. Id. R. 60(b)(2)(A)-(C).

APPENDIX B

FILED
DEC 16 2002
DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY K. WEIGAND

BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA	)	Comm. No. 97-1909
KENNETH J. PEASLEY, Bar No. 004114	)	**DISCIPLINARY COMMISSION REPORT**
RESPONDENT.	)	

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on November 16, 2002, pursuant to Rule 53(d), Ariz. R. S. Ct. The Commission considered the Hearing Officer's Report filed July 1, 2002, recommending a 60-day suspension, one year of probation (LOMAP and a limited caseload) and costs of these disciplinary proceedings. Both parties filed objections and requested oral argument. Respondent also filed a separate objection to costs. On October 21, 2002, the State Bar filed a Motion to Supplement the Record with the Arizona Supreme Court Opinion filed October 11, 2002 in *State v. Minnitt,* ____ Ariz. ____,55 P.3d 774, 384 Ariz. Adv. Rep. 8 Ariz. (2002). The Commission simultaneously filed an Order giving the parties an opportunity to submit additional memoranda solely on what effect, if any, *Minnitt* should have on these proceedings. Both parties filed supplemental briefs and oral argument was held. The Respondent, his counsel and the State Bar were present. The State Bar argued for disbarment. Respondent argued for no more than a censure, or in the alternative, to adopt the Hearing Officer's recommendations.

Decision

Upon review of the record on appeal, eight members[1] of the Commission considering this matter unanimously adopt and incorporate by reference the Hearing Officer's findings of fact[2] and conclusions of law relating to misconduct, but, on *de nova* review, reach different conclusions regarding the presence of aggravating and mitigating factors, and modify the recommended sanction to reflect disbarment and partial costs.[3]

Discussion of Decision

The Commission's standard of review set forth in Rule 53(d)(2), Ariz. R. S. Ct., states that the Commission reviews questions of law *de novo.* In reviewing findings of fact made by a hearing officer, the Commission applies a clearly erroneous standard. Mixed findings of fact and law are also reviewed *de novo. State v Blackmore,* 186 Ariz. 630, 925 P.2d 1347 (1996) citing *State v. Winegar,* 147 Ariz. 440, 711 P.2d 579 (1985). The State Bar asked the Commission to find additional facts it contends were proven by clear and convincing evidence but not included in the Hearing Officer's Report, and to find implicit facts not contained in the Hearing Officer's findings of fact, but that the Bar feels are supported in his conclusions of law. The State Bar argued these additional facts establish Respondent's state of mind and demonstrate a far-reaching pattern of misconduct. *See* State Bar's Opening Brief, pp.6-15 and Appendix filed September 23, 2002. The Commission has no authority to independently make additional findings of fact. *See In re Tocco,* 194 Ariz. 453, 456,984 P.2d 539, 542 (1999). Moreover, the Commission does not find the Hearing Officer's findings of fact clearly erroneous.

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[1]Commissioner Choate recused herself from consideration of this case.

[2]The Hearing Officer inadvertently stated that both parties filed a petition for review when only the Respondent filed a petition. *See* Report, p. 12, finding of fact #22.

[3]The Commission did not assess against Respondent the State Bar's costs incurred from Lex Solution, Corp., which totaled $7,330.20.

Historically, the Commission gives great deference to a hearing officer's report and recommendation. *Matter of Pappas,* 159 Ariz. 516, 768 P.2d 1161 (1989). The Hearing Officer's Report in this complex matter was well reasoned and thorough. This was a highly contentious case and the record was extremely voluminous. The hearing spanned a total of 11 days with numerous exhibits and many witnesses. The Hearing Officer's work in this case epitomizes the valuable contributions that volunteer hearing officers provide to the discipline process while maintaining their own busy practices.

The Commission, as well as the Hearing Officer, found clear and convincing evidence[4] that Respondent violated Rule 42, specifically:

ER 3.3(a)(4)	(candor toward a tribunal)	2 Violations
ER 4.1(a)	(false statement of material fact or law)	2 Violations
ER 3.3(a)4	(candor toward the tribunal)	2 Violations
ER 4.1(a)	(false statement of material fact or law)	2 Violations
ER 8.4(c)	(conduct involving dishonesty, fraud, deceit or misrepresentation)	2 Violations
ER 8.4(d)	(conduct prejudicial to the administration of justice)	2 Violations

Respondent while employed as a prosecutor, engaged in prosecutorial misconduct by intentionally eliciting false testimony from a witness (Tucson police detective Joseph Godoy) and knowingly making false statements in two separate capital murder trials.[5] The misconduct was also found to be dishonest and prejudicial to the administration of justice because it resulted in criminal convictions and imposition of the death sentence based upon perjured testimony. *State v. Minnitt, supra.* Minnitt was incarcerated and faced a sentence of death from 1992 to 2002. It is particularly egregious that Respondent engaged in this misconduct while seeking the death penalty. Significant court resources were expended in conducting multiple trials, and in remedying Respondent's misconduct

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[4]Counts Three, Four and Five are dismissed. *See* Report, p. 21.

[5]Detective Godoy was indicted on May 17, 2001 for perjury. He was subpoenaed to testify in the discipline process but his attorney advised he would invoke the Fifth Amendment privilege and therefore, the subpoena was not enforced. *See* Report, p. 12, finding of fact #21.

to ensure that there was not a gross miscarriage of justice. Respondent adamantly maintained throughout these disciplinary proceedings that he did not intentionally elicit false testimony. *See* Commission transcript, p. 12. An excellent discussion of Respondent's particular misconduct is contained in the Hearing Officer's detailed Report, which is attached to this Report and incorporated herein.

In determining the appropriate sanction, our Supreme Court considers the ABA *Standards for Imposing Lawyer Sanctions ("Standards")* a suitable guideline. *In re Kaplan,* 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Commission are consistent in utilizing the *Standards* to determine appropriate sanctions for attorney discipline. In imposing a sanction after a finding of misconduct, consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating and mitigating factors. *See Standard* 3.0. A review of *Standard* 6.0, involving Violations of Duties Owed to the Legal System, indicates that disbarment is the presumptive sanction for cases involving false statements, fraud and misrepresentation. The Respondent so concedes. *Standard* 6.11 provides:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes significant or potentially significant adverse effect on the legal proceedings.

The *Standards* further provide that lawyers are officers of the court and the public expects a lawyer to abide by the legal rules of substance and procedure that affect the administration of justice. Lawyers must always operate within the bounds of the law and cannot create or use false evidence or make a false statement of material fact.

Here, Respondent intentionally violated his duty to the legal system and his most fundamental duty as an officer of the court by intentionally introducing false testimony in two murder trials and knowingly making false statements of fact, causing serious harm to criminal defendants, Minnitt and his co-defendant McCrimmon, causing a significant adverse effect on the legal proceedings, and potentially

undermining public confidence in the criminal justice system.

Minnitt's criminal appeal was progressing simultaneously with the disciplinary proceedings. The Hearing Officer found that Respondent's intentional misconduct caused potential injury in that the death penalty was sought and might have been carried out. *See* Report, p. 22. The Commission bases its recommendation entirely upon the findings of fact and conclusions of law of the Hearing Officer and not upon the Arizona Supreme Court's Opinion in *State v. Minnitt, supra,* which was issued after the Hearing Officer filed his Report. The Commission takes judicial notice that the *Minnitt* Opinion is consistent with the Hearing Officer's determination that Respondent's conduct was intentional.[6]

. . .

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[6]The Commission may take judicial notice of the records of the Arizona Supreme Court. *Wallace v. Shields*, 175 Ariz. 166, 176, 854 P.2d 1152, 1162 n.2 (App. 1992). *See* generally Udall, Livermore, Escher and McIlvain, Arizona Practice–Law of Evidence, § 152 at 331 (1991). Ultimately, the *Minnitt* Opinion overturned Judge Nichols' denial of the defendant's motion to dismiss, vacated the defendant's murder conviction and barred retrial based on Arizona's constitutional protection against double jeopardy. *Minnitt* further held that Respondent engaged in extreme misconduct that he knew was grossly improper and highly prejudicial, both as to the defendant and to the integrity of the system and that he did so with knowing indifference to the danger of mistrial, if not a specific intent to cause a mistrial. The Court also determined that Respondent not only knew the testimony was false, he failed to clarify the mistake and then argued the evidentiary point to the jury. The Court concluded that the conduct was a calculated deception that deprived the defendant of a fair trial and subjected him to the death penalty. *See Minnitt*, 55 P.3d at 777, 782 (2002).

Prosecutors take an oath to administer justice. A prosecutor is charged with the specific and fundamental obligation to seek justice and ensure that guilt is decided upon the basis of sufficient evidence — not merely to obtain a conviction.[7] In fulfilling those obligations, a prosecutor must refrain from using improper methods to obtain a conviction:

> [T]he prosecutor is not the representative of an ordinary litigant; he is a representative of a government whose obligation to govern fairly is as important as its obligation to govern at all. The prosecutor's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." Thus, "while he may strike hard blows, he is not at liberty to strike foul ones." It is the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction just as it is his duty to use all proper methods to bring about a just conviction.

State v. Pool, 139 Ariz. 98, 103, 677 P2d 261, 266 (1984), *quoting Berger v. United States,* 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.Ed. 1314 (1935); *See also State v. Bible,* 175 Ariz. at 600, 858 P.2dd at 1023 (1993). In this case, Respondent lost sight of these duties, attempting to obtain a conviction and the sentence of death through any means, including perjured testimony.

The Commission, as well as the Hearing Officer, having concluded that disbarment is the presumptive sanction, reviewed *Standards* 9.22 and 9.32, aggravating and mitigating factors, respectively to determine whether and to what extent aggravating and mitigating factors should affect the ultimate sanction imposed. *In re Augenstein,* 178 Ariz. 133, 136, 871 P.2d 254, 257 (1994).

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[7]*See* Commentary to ER 3.8. Respondent was charged with ethical violations involving dishonesty and conduct prejudicial to the administration of justice. He was however, not charged with a violation of ER 3.8 (special responsibilities of a prosecutor).

The Hearing Officer found one (1) aggravating factor: 9.22(i) (substantial experience in the practice of law)[8] present in the record, and provided case law indicating that the presence of this factor is often offset by mitigating factor 9.32(a) absence of prior disciplinary history, which is found to be a factor here. The Commission agrees these above mentioned factors are present, but reaches a different conclusion than the Hearing Officer. Substantial experience in the practice of law can be an aggravating factor when the misconduct is the type of misconduct that would be less likely to occur the more experienced the lawyer becomes. *Matter of Savoy,* 181 Ariz. 368, 371 (1995).

It is the Commission's belief that Respondent's significant experience in the practice of law is particularly aggravating given that Respondent is a seasoned prosecutor with over 25 years of experience. He has prosecuted numerous capital murder cases and his position allows him to assign himself the most serious murder cases. Given this experience, it is unconscionable that, when confronted with Detective Godoy's false testimony (which he intentionally elicited) Respondent wrongfully argued that Detective Godoy answered the crucial questions in order to protect an informant. Respondent further argued to the court and jury that it is a "sick system" that puts police officers in a position where they had to testify as Godoy had. *See* Hearing Officer's Report, p. 17, finding of fact # 45. Respondent's flawed reasoning presented in the trial court in the underlying proceedings suggests the potential for future misconduct by Respondent, which places the public and the criminal justice system at substantial risk.

The Commission finds *de novo* additional aggravating factors 9.22(b) selfish and dishonest motive and (d) multiple offenses. The record supports the finding that Respondent elicited false testimony, made false statements of material fact, and engaged in dishonest conduct prejudicial to the administration of justice in two separate trials with two separate defendants in order to obtain convictions and the death sentence. He wanted to "win" at any cost. *See* also *In re James H. Dineen,* 481 A.2d 499 (Maine 1994) in which a selfish and dishonest

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[8]Respondent was admitted to the practice of law in Arizona on April 26, 1975.

motive was established and disbarment imposed for deliberately eliciting false testimony from a client on the witness stand. *Dineen* held that there is no more egregious violation of a lawyer's duty as an officer of the court, and no clearer ethical breach.

The State Bar additionally argued for application of aggravating factors 9.22 (c) pattern of misconduct and (g) refusal to acknowledge wrongful nature of conduct; however, the Commission does not find these factors. Presenting a vigorous defense does not necessarily result in a finding that a respondent refused to acknowledge the wrongful nature of the misconduct. *In re Curtis,* 184 Ariz. 256, 908 P.2d 472 (1995). Deference regarding these factors is given to the tribunal that heard the witnesses firsthand. *Matter of Varbel,* 182 Ariz. 451, 453, 897 P.2d 1337, 1339 (1995).

The Hearing Officer found six (6) factors in mitigation: 9.32(a) absence of a prior disciplinary record, (e) full and free disclosure to disciplinary board or cooperative attitude toward proceeding, (g) character and reputation, [9] (h) physical disability,[10] (j) delay in disciplinary proceedings[11] and (j) interim rehabilitation.

The Commission agrees with the Hearing Officer that the mitigating factors of absence of a prior disciplinary record, full and free disclosure or cooperative attitude, and character and reputation are supported by the record.

Because of inconsistent application by the courts, mitigating factors 9.32 (h) and (i) were amended and combined (j) (interim

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[9]Numerous witnesses testified on Respondent's behalf and several letters were submitted to support this factor. The Hearing Officer gave significant weight to this factor in reducing the presumptive sanction of disbarment to a short-term suspension.

[10]The Hearing Officer found this factor applied only to the *Minnitt* and *McCrimmon* retrials in August 1997; however, the Commission determined the threshold for this factor was not met.

[11]A Probable Cause Order was entered on May 21, 1999 and the Complaint was filed May 11, 2002.

rehabilitation) in February 1992, and a 4-pronged criteria was adopted.[12] The criteria established that mitigating factors of physical and mental disability and chemical dependency including alcohol or drug abuse *may* be considered when 1) there is medical evidence that the respondent is affected by the disability, 2) the disability caused the misconduct, 3) the respondent's recovery is demonstrated by a meaningful and sustained period of successful rehabilitation, and 4) that the recovery arrested the misconduct and that a recurrence of the misconduct is unlikely.

The *Commentary* further provides that issues of physical and mental disability or chemical dependency offered as mitigating factors in disciplinary proceedings require careful analysis. A direct causation between the disability or chemical dependency and the offense *must* be established. If the offense is proven to be attributable solely to a disability or chemical dependency, it should be given the greatest weight. If it is principally responsible for the offense, it should be given very great weight; and if it is a substantial contributing cause of the offense, it should be given great weight. In all other cases in which the disability or chemical dependency is considered as mitigating, it should be given little weight. *See Commentary* to *Standard* 9.32, paragraph 3.

The Hearing Officer found that Respondent was experiencing medical problems with his vision, pain on his left side, including periodic vertigo, and difficulties in focusing and concentration. *See* Report, pp. 23-24 and Commission transcript, pp. 46-48. Although Respondent provided sealed medical records that support a diagnosis of vertigo, during the 1997 Minnitt and McCrimmon retrials, he failed to establish that the disability caused the misconduct, failed to demonstrate a sustained period of rehabilitation, and that a recurrence of the misconduct is unlikely.

Therefore, the Commission does not find sufficient evidence to support factors 9.32(h) physical disability or (j) interim rehabilitation. Moreover, the Commission is not persuaded, given the seriousness of the misconduct, the injury sustained and the potential for future injury,

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[12]*See* Amendments to the ABA *Standards for Imposing Lawyer Discipline* adopted by the ABA House of Delegates in 1993, specifically 9.32 Mitigation.

that the remaining mitigating factors are sufficient to justify a reduction of the presumptive sanction of disbarment to a 60-day suspension.

The Commission also does not believe that the mitigating factor of delay is present. This was a complex case, which took a significant amount of time to prepare and present on both sides.

Respondent argued that his public and personal humiliation was an additional mitigating factor. This factor was rejected by the Hearing Officer. The Commission agrees and concluded that even if this factor were found, its presence would not change the overall outcome.

The Commission then considered the proportionality analysis offered for similar misconduct. While no case was directly on point, nine cases proved instructive. In *Matter of Fresquez,* 162 Ariz. 328, 783 P.2d 774 (1989), the respondent was disbarred for preparing a false, backdated letter to the State Bar during its investigation, submitting a false affidavit and for lying under oath during bar proceedings. The Arizona Supreme Court found the case for disbarment to be compelling.

In *Matter of Fioramonti,* 176 Ariz. 182, 859 P.2d 1315 (1993), manufacturing evidence during the bar investigation, committing perjury, and suborning perjury warranted a three-year suspension in light of the mitigation present in that case. The Commission believes that presenting perjured testimony in a capital murder trial, not once, but twice, is more egregious and has the potential for greater harm than presenting false evidence in one's own defense in bar proceedings.

In *Matter of Wolfram,* 174 Ariz. 49, 847 P.2d 94 (1993), the respondent, a defense attorney, was suspended for 18 months, ordered to pay restitution, and obtain 24 hours of continuing legal education, for failing to adequately prepare for a client's criminal trial, and failing to respond to the state bar's inquiries in violation ERs 1.1, 1.3, 1.4 and SCRs 51 (h) and (i). *Wolfram* further held that where the defendant faces the potential for a loss of liberty, the potential harm caused by the misconduct is given added significance. Here, not only was a loss of liberty at stake, but also loss of life, as the Respondent argued consistently and won verdicts for the death penalty.

In re Hansen, 179 Ariz. 229, 877 P.2d 802 (1994), the respondent, a prosecutor, lied to the court to cover her error in dismissing a witness prematurely. Hansen admitted her conduct and accepted an agreement for censure for violating ERs 1.3, 3.3(a)(1),

4.1(a), 8.4(a), (c) and (d). The agreement was tendered prior to issuance of a formal complaint. The court agreed that extremely significant mitigation was present and no actual injury occurred; thereby justifying a reduction the presumptive sanction of disbarment or suspension to censure.

In re Florida Bar v. Cox, 794 So.2d 1278 (2001), the respondent, an Assistant United States Attorney, knowingly presented false evidence during a criminal prosecution with the intent to obtain a benefit for the witness. The court determined that disbarment was the presumptive sanction but it was reduced to a one-year suspension based on mitigating factors.

In *Matter of Brey,* 171 Wis.2d 65, 490 N.W.2d 15 (1992), the respondent abused his authority as a prosecutor and subsequently made false statements to the court and disciplinary board concerning his misconduct. A 60-day suspension was imposed.

In *In re Norton and Kress,* 128 N.J. 520, 608 A.2d 328 (1992), the respondent prosecutors falsely informed the court that police officers did not intend to pursue a DUI case. The respondents knew that this information was false and caused the case to be dismissed. Respondents received a three (3) month suspension.

In *Disciplinary Counsel v. Green,* 74 Ohio St.3d 13, 655 N.E. 2d 1299 (1995), the respondent knowingly lied to the court with the intent to mislead the judge into ordering a dismissal. A one (1) month suspension was imposed.

Finally, a prosecutor received a 90-day suspension for failure to recognize conflicts of interest in *In re Ockrassa,* 165 Ariz. 576, 799 P.2d 1350 (1990). While insensitivity to conflicts of interests when dealing with criminal defendants is a serious offense warranting a substantial sanction, obtaining convictions with perjured testimony is far more serious and requires a greater sanction.

The sanction imposed must serve to maintain the integrity of the legal system in the eyes of the public. *In re Fioramonti,* 176 Ariz. at 187, 859 P.2d at 1320 (1993). This instant matter is easily distinguished from the above-mentioned cases in that the misconduct was more egregious in nature because Respondent was seeking, and obtained, the death penalty. Respondent has failed to demonstrate to the Commission's satisfaction that a recurrence of the misconduct is

Commission's satisfaction that a recurrence of the misconduct is unlikely. In a criminal justice system that allows the prosecutor to seek the ultimate sanction for first-degree murder, the integrity of that system and those who participate within it must be beyond reproach. Given the seriousness of the misconduct and the significant injury it caused to the defendants and to the legal system, the Commission is convinced that the public and the criminal justice system will not be protected by anything less than disbarment.

Conclusion

The purposes of attorney discipline are to protect the public and deter similar conduct by other lawyers, *Matter of Kersting,* 151 Ariz.171, 726 P.2d 587 (1986); instill public confidence in the bar's integrity, *Matter of Horwitz, 180* Ariz. 20, 29, 881 P.2d 352, 362 (1994); and maintain the integrity of the legal system, *In re Fioramonti, supra.*

Therefore, having considered Respondent's misconduct, application of the ABA *Standards,* factors present in aggravation and mitigation, and a proportionality analysis, the Commission recommends disbarment and partial costs of these disciplinary proceedings.

RESPECTFULLY SUBMITTED this 16th day of December, 2002.

/s/
Peter Cahill, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 16th day of December, 2002.

Copy of the foregoing mailed and faxed
this 16th day of December, 2002, to:

Michael Drake
Hearing Officer 9G
300 North Main, Suite 205Tucson, AZ 85701-8230

APPENDIX C

FILED
JUL 1 2002
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY_____

BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA)	)	Case No: 97-1909
	)	**HEARING OFFICER'S**
KENNETH PEASLEY,	)	**REPORT AND**
Bar No: 004114,	)	**RECOMMENDATION**

PROCEDURAL HISTORY

September 9, 1997

Complaint against Respondent filed with State Bar by defense attorney Richard Lougee.

March 3, 1998

State Bar forwarded Complaint to Respondent for response. State Bar investigation started.

May 21, 1999

Probable Cause Order filed by the Probable Cause Panelist

May 11, 2000

Complaint filed with the Disciplinary Clerk (This was the first and only Complaint filed. Throughout the pleadings, Respondent inaccurately refers to this as "Complaint II").

May 15, 2000

Notice of Assignment of Case to Hearing Officer 9F Miller.

May 24, 2000

Attorney Stuehringer accepts service on behalf of Respondent.

June 13, 2000

Respondent's Motion to Extend Time to Answer.

Respondent's Motion to Dismiss Due to Prosecutorial Vindictiveness.

June 15, 2000

Respondent's Notice of Transfer of Case from Hearing Officer Miller and request for appointment of three-person hearing committee.

June 23, 2000

Notice of Reassignment of Case from Hearing Officer Miller to Hearing Officer 9I Whitley.

June 27, 2000

Notice of Recusal by Hearing Officer Whitley.

July 5, 2000

Notice of Assignment of Case to Hearing Officer 9G Drake.

August 15, 2000

State Bar's Motion to Determine Counsel.

August 16, 2000

Order denying Respondent's Motion to Dismiss for Prosecutorial Misconduct.

September 5, 2000

Respondent's Answer.

September 7, 2000

Notice of Assignment of Settlement Officer Haydon 9E to conduct Settlement Conference.

September 21, 2000

Respondent's Motion for Reconsideration Re: Prosecutorial Vindictiveness.

October 17, 2000

Hearing on Respondent's Motion for Reconsideration of Ruling on Motion to Dismiss for Prosecutorial Vindictiveness and Hearing on State Bar's Motion to Determine Counsel (Transcribed)

December 26, 2000

Notice of conclusion of Settlement Conference by Hearing Officer Haydon. No settlement was reached.

December 29, 2000

Notice setting Hearing for February 20, 2001.

January 9, 2001

Respondent's Motion to Continue Hearing Date of February 20, 2001.

January 16, 2001

Order

1. Deny Respondent's Motion for Reconsideration of Denial of Motion to Dismiss for Prosecutorial Vindictiveness.

2. Regarding State Bar's Motion to Determine Counsel, ordered that Mr. Stuehringer is not disqualified from representing Respondent and ordered that he cannot be deposed nor called as a witness.

January 18, 2001

Status Conference (Transcribed)

January 22, 2001

Respondent's Motion to Compel Discovery of FBI materials held by State Bar.

January 26, 2001

Order granting Respondent's Motion to Continue Hearing and Notice of Hearing resetting Hearing for April 16, 2001.

March 1, 2001

Order granting Respondent's Motion to Compel production of FBI materials.

March 13, 2001

Order after Prehearing Conference on March 12, 2001 regarding subpoenas and character witness list.

March 29, 2001

Order by William L. Rubin, Chair of Disciplinary Commission, granting Respondent's Motion to Continue and resetting the hearing for June 18, 2001.

April 27, 2001

Respondent's Petition to Arizona Supreme Court for Special Action on issue of Prosecutorial Vindictiveness.

May 26, 2001

Order setting dates for Motions. (Not shown on Clerk's Docket Sheet.)

May 30, 2001

Supreme Court declines jurisdiction on Respondent's Petition for Special Action.

June 8, 2001

Notice setting Hearing for June 18-22, 2001.

June 11, 2001

Order Denying Respondent's request to preclude testimony of attorney David Lipartito.

June 18, 2001

Hearing, Transcript Vol. I

State Bar Opening Statement, pages 21-62
Respondent's Opening Statement, pages 63-83
State Bar witness Richard Lougee, pages 91-251

June 19, 2001

Hearing, Transcript Vol. II

Hearing adjourned for the day because both attorneys were ill, pages 255-258.

June 20, 2001

Hearing, Transcript Vol. III

Hearing on issue whether Detective Godoy should be called as a witness, pages 268-290.
Continue testimony of Mr. Lougee, pages 290-368.
State Bar witness David Lipartito direct examination only, pages 372-394
State Bar witness attorney Barry Baker Sipe, pages 395-548.

June 21, 2001

Hearing , Vol. IV

State Bar witness attorney Wanda Day, pages 565-705
State Bar witness attorney Harriette Levitt, pages 710-842

June 22, 2001

Hearing, Vol. V

Respondent's character witness Judge Bernini, pages 866-881
Respondent's character witness Judge Collins, pages 883-890

Respondent's character witness Judge Velasco, pages 891-899

Respondent's character witness attorney Michael Bloom, pages 901-931

State Bar witness attorney Carla Ryan, pages 931-960

June 28, 2001

Notice setting continued hearing on July 12, 2001 and August 8, 2001.

July 12, 2001

State Bar witness Eric Larsen

Hearing on pending legal matters.

July 16, 2001

Order permitting parties to submit additional memos on pending legal matters.

July 20, 2001

Respondent's memo in support of Motion to Strike Testimony of David Lipartito, or in the alternative, request for directive to defend.

July 20, 2001

State Bar responds to Motion to Strike Testimony of David Lipartito.

August 3, 2001

Order on Pending Matters

1. Grant Respondent's Motion to Strike Testimony of David Lipartito.
2. Grant Respondent's Motion to Admit Transcripts of Testimony of Detective Godoy in underlying murder trial and before State Grand Jury.
3. Grant Respondent's Motion to submit character evidence of Alfred S. Donau, III by deposition.

August 7, 2001

Arizona Supreme Court Order denying State Bar's request for Interlocutory Stay.

The Court later denied State Bar's Petition for Review on the Motion to Determine Counsel.

August 8, 2001

Hearing Vol. VI

State Bar calls Respondent to testify, pages 978-1184.

August 9, 2001

Hearing Vol. VII

Continued testimony of Respondent, pages 1195-1454.

August 10, 2001

Hearing Vol. VIII

Continued testimony of Respondent pages 1464-1613.

State Bar witness Eric Larsen, pages 1615-1619.

August 15, 2001

Notice continuing hearing for further testimony August 29, 2001.

August 29, 2001

Hearing Vol. IX

Continued testimony of Mr. Larsen, pages 1707-1783.

Respondent's witness Teresa Miller, pages 1841-1863.

August 30, 2001

Hearing Vol. X

State Bar Closing Statement pages 1923-1982.

Respondent's Closing Statement pages 1982-2056.

State Bar Rebuttal Statement pages 2056-2076.

September 5, 2001

Order requesting Proposed Findings and Conclusions by October 22, 2001.

November 6, 2001

Respondent's Motion to Reopen Case for further cross examination of Harriette Levitt.

November 6, 2001

State Bar's Proposed Findings and Conclusions of Law.

November 8, 2001

Respondent's Proposed Findings and Conclusions of Law.

December 7, 2001

Order granting Motion to Re-open, setting hearing for December 14, 2001.

December 19, 2001

Hearing Vol. XI

Continued Cross-examination of State Bar witness Harriette Levitt, pages 2094-2146.

February 8, 2002

Matter submitted.

FINDINGS OF FACT

1. Respondent is a member of the State Bar of Arizona, having been admitted to the practice of law on April 26, 1975. He first worked in the Pima County Public Defender's office. In January 1978, he began working in the Pima County Attorney's office. He has worked there ever since. Prior to the El Grande murder trials, he had had approximately 250 felony trials, 140 of which were homicide trials. Approximately 60 of the trials were capital cases in which the State sought the death penalty.

2. On January 24, 1992, three people were murdered during a robbery at the El Grande Market in Tucson, Arizona.

3. Ultimately, three individuals were arrested and charged with these murders: Martin Fong, aka "ChaChi"; Andre Minnitt; and Christopher McCrimmon.

4. Fong's trial commenced October 14, 1993 before Judge Buchanan. He was convicted.

5. A joint trial for McCrimmon and Minnitt commenced November 8, 1993 before Judge Buchanan. Both were convicted, but the convictions were reversed on appeal for reasons unrelated to the issues in this disciplinary case.

6. Minnitt's retrial commenced August 20, 1997 before Judge Nichols. The trial resulted in a hung jury.

7. McCrimmon's retrial commenced August 27, 1997 before Judge Nichols. McCrimmon was found not guilty.

8. Anticipating a third trial would be held for Minnitt, his counsel in 1998 filed a Motion to Dismiss. It was denied.

9. Minnitt's third trial commenced April, 1999. He was convicted.

10. Respondent handled all these matters except the third trial of Minnitt. The lead Tucson Police Department detective was Joseph Godoy. At the time of the El Grande murders, Detective Godoy had been with the Tucson Police Department approximately 12 years. He had worked as a uniformed officer, on the assault detail, and had

been a homicide detective for several years before El Grande. Detective Godoy is very smart and clever; knows his cases; knows how to answer questions; and knows how to anticipate what a defense attorney is going to do on a case. (Transcript of Disciplinary Hearing, hereafter "T" page 717.)

Detective Godoy and Respondent first met when they worked together on a case approximately 10 years before El Grande. According to Respondent, they became friends almost immediately. Their families socialized to a limited extent outside work. Respondent received an appointment as a special Tucson City Magistrate to conduct the wedding of Detective Godoy and his wife.

Throughout the investigation of the murders and prior to any charges being filed, Respondent consulted with Detective Godoy on multiple occasions concerning the case. (Respondent's answer paragraph 1.)

11. Central to the State's case in all trials except Fong's was the credibility of one Keith Woods. He was a convicted felon and was in prison at the time of the murders. Woods was released from prison on parole on August 21, 1992. On August 30, 1992, Woods was stopped by police for cocaine possession. This jeopardized his parole status. Woods was not involved in the El Grande murders, but was called as a witness to testify that, after Woods' release from prison, Minnitt and McCrimmon had confessed their involvement to him and that they had implicated Martin Fong. Woods had been associates of McCrimmon and Minnitt in the past. Since there was no physical evidence found at the crime scene implicating McCrimmon and Minnitt, Woods' testimony was critical. Woods was also highly impeachable. He had multiple felony convictions; he was a drug addict; and he had made a deal with Godoy to testify in the El Grande cases and the State in turn would give him consideration on his own legal difficulties.

Detective Godoy interviewed Woods on September 8, 1992. The first part of the conversation was not recorded; the part regarding the purported confession was recorded. Prior to the interview, Detective Godoy had learned certain facts about the case and had identified Fong, Minnitt, and McCrimmon as suspects. Upon questioning by Respondent at the trials, Detective Godoy testified he did not, in fact, have such information at the time of the Woods interview,

and, arguably, therefore could not have fed this information to Woods before the recording began.

The central issue in this disciplinary case, therefore, is whether Respondent elicited the admittedly false testimony knowing at the time that it was false.

12. Subsequent to the El Grande murders, an attempted robbery/shootout occurred on August 26, 1992 at Mariano's Pizzeria in Tucson. Detective Godoy was not the detective on this case, but the names of all three El Grande suspects arose in the Mariano investigation.

13. Detective Godoy authored two investigative reports that demonstrate what he knew prior to the Woods interview September 8, 1992. State Bar Exhibit 8 is Detective Godoy's report dated September 9, 1992 in the Mariano Case No. 92-08260652. State Bar Exhibit 10 is Detective Godoy's report dated September 15, 1992 in the El Grande Case No. 92-06240661. These reports are inconsistent in some respects, but, along with other evidence, indicate that, before the Woods' interview September 8, 1992, Detective Godoy had the following information:

a) On August 31, 1992, Godoy himself had received information directly from an anonymous source that a Martin Soto was involved. On the same day, Godoy asked Mr. Gee, owner of El Grande, if Martin Soto had been an employee. Mr. Gee did not recognize the name Martin Soto, but said a Martin Fong had been an employee. Godoy researched the criminal history of Martin Fong, and determined that Martin Fong and Martin Soto were the same person. State Bar Exhibit 8. (Godoy's September 9, 1992 report.)

b) Also on August 31, 1992, Detective Zimmerling told Godoy that one of his informants implicated "ChaChi" and Christopher McCrimmon in the El Grande murders. Godoy determines that McCrimmon had a criminal history. State Bar Exhibit 8.

c) On September 2, 1992 Godoy assisted Detective Fuller, the detective in the Mariano's case, in arresting both McCrimmon and Minnitt in the Mariano's case. Godoy then personally interviewed both of them about El Grande. McCrimmon admitted knowing Fong. State Bar Exhibit 8.

. . .

. . .

d) A Tucson Police Department "Fingerprint Comparison Report" was made September 1, 1992. It list McCrimmon as "subject one" and Minnitt as "subject two." The report indicates McCrimmon's fingerprints were found on a car near the El Grande Market.

e) Godoy himself has conceded the three defendants were suspects prior to the Woods' interview:

> While the reports speak for themselves, they do show that prior to September 8, 1992, Martin Soto-Fong, Christopher McCrimmon, and Andre Minnitt were all possible suspects in the case based on the anonymous information. Affidavit of Joseph Godoy dated May 1, 1998, State Bar Exhibit 38, Item 6.

14. Considerable time and discussion at hearing concerned Detective Godoy's report of September 9, 1992. The original report is Respondent's Exhibit 40. State Bar Exhibit 8 is a copy. Page 2 of State Bar Exhibit 8 recites Detective Zimmerling advised Godoy about an Hispanic male named [blank]. The name in the original report had been whited out and someone had written in "CI," (confidential informant). This likely was done by someone in the County Attorney's office while preparing copies of the report for defense counsel. State Bar Exhibit 7 is a copy of the same report. The name "ChaChi" had been written in cursive over the "CI." There was concern, therefore, that the report had been altered inappropriately. Defense attorney Levitt, who represented McCrimmon in the joint trial, testified at hearing however that she wrote the name "ChaChi" on the report when she received it. At some point in the disciplinary proceedings, her report was given to the State Bar. This explains the discrepancy. It is inconsequential.

15. Prior to September 1, 1992, Respondent knew that Minnitt was a suspect in the El Grande case, in the sense that they had such information, but did not believe the information was usable in court. Respondent knew that Godoy had questioned Minnitt on September 2, 1992 because:

. . .

. . .

> . . . at some point obviously before the start of Fong I had read the reports and looked at the reports and I knew about the information that Godoy had. (T pages 995-96.)

Respondent knew on September 2, 1992, that Godoy had questioned McCrimmon and Minnitt regarding the El Grande case. (T page 993: pages 1375-77.)

16. Respondent testified that both Detective Godoy's September 9, 1992 and September 15, 1992 reports were extremely important in the El Grande case. It was important that he, as prosecutor, be familiar with these reports in order effectively to question witnesses. (T pages 1327-28.)

17. Prior to the trials, defense lawyers for McCrimmon and Minnitt were given copies of Godoy's reports setting out what information Godoy had before interviewing Keith Woods September 8, 1992.

18. Respondent was not charged with any violations arising from his conduct in the Fong case, the first defendant to go to trial. Nevertheless, the following findings are made:

a) Keith Woods did not testify in the Fong trial. (There is no contention Fong confessed to Woods. Rather, McCrimmon and Minnitt allegedly confessed to Woods and implicated Fong. To have allowed Woods to testify about that implication would have been hearsay and would have denied Fong his right to confront witnesses against him.)

b) The defense strategy in the Fong trial was to show that Detective Godoy had focused his investigation on Fong because Fong was a former employee of El Grande. The defense attacked the credibility of Detective Godoy, not that of Keith Woods.

c) The key evidence against Fong was that his fingerprints were found at the scene.

d) Respondent asked Godoy when he first met with Mr. Gee, owner of El Grande. Godoy answered it was the first week of September, when "Mr. Fong became a focus of the case." Fong trial transcript, State Bar Exhibit 1A, Tab 5 page 88.

19. Godoy was interviewed by defense attorneys prior to the Fong trial. Respondent sat in or parts of the interview and read the transcript of it before the Fong trial, including parts where Godoy discussed what information he had regarding the three suspects prior to the Woods' interview. (T. page 1330; Respondent's Exhibit 38, page 86; State Bar Exhibits 14 and 15.)

20. At the trials in El Grande, Godoy sat with Respondent at counsel table. This was done so Godoy could assist Respondent during the trial. (T. page 987.)

21. Godoy did not testify in the disciplinary case. Godoy had been indicted on May 17, 2001 on eight counts of perjury. Six arose from his testimony in an unrelated case, State v. Segura, and two arose from his testimony in the Minnitt retrial. Godoy was subpoenaed for the disciplinary hearing, but his defense attorney Michael Piccarreta avowed Godoy would invoke the Fifth Amendment at the disciplinary hearing. The subpoena therefore was not enforced.

22. This disciplinary case was extra-ordinarily complicated and the evidence voluminous. The transcripts of the four underlying murder trials comprise 4,800 pages. In the disciplinary hearing, 13 witnesses testified over 11 days of hearing. The hearing transcript comprises 2,146 pages. State Bar offered 54 exhibits and Respondent offered 46 exhibits. In addition, prior to the disciplinary hearing, there were approximately 12 reported hearings on pre-trial motions and status conferences. The Hearing Officer denied the State Bar's Motion to Determine Counsel and denied Respondent's Motion to Dismiss for Prosecutorial Vindictiveness. Each party filed a Petition for Review with the Arizona Supreme Court. Each Petition was denied.

COUNT ONE (McCRIMMON/MINNITT JOINT TRIAL)

23. The first joint trial commenced November 2, 1993 before Judge Buchanan. During jury selection, a mistrial was declared. A new trial commenced November 8, 1993 before Judge Buchanan. McCrimmon was represented by Barry Baker Sipe and Ann Greenberg. Minnitt was represented by Harriette Levitt.

24. In his opening statement, Respondent stated the following: Detective Godoy did not know that Fong had worked at the El Grande until Godoy interviewed Woods on September 8, 1992. State Bar Exhibit 1B, Tab 13, page 163. Respondent further stated that, at the

time he interviewed Woods, Godoy did not know McCrimmon, Minnitt, nor Fong. Tab 13, page 180. Both statements were false.

25. On direct examination Respondent asked Godoy: "Sir, when was the first time you became aware personally that a former employee may have been involved in the El Grande homicide?" Detective Godoy answered: "When I spoke with Keith Woods on September 8,1992." Detective Godoy's testimony was false.

26. On redirect examination, Respondent asked Godoy if, at some point after talking to Keith Woods, Godoy contacted the Gee family to ascertain whether certain employees had worked at El Grande in the past. Godoy answered "Yes." Tab 16 page 146. This was false. Godoy spoke to Mr. Gee before the Woods' interview.

27. At a bench conference, Respondent stated that, up to the time of the Woods' interview, Godoy was not looking at any of those three people (McCrimmon, Minnitt, Fong). Tab 13, page 148. This was not true.

28. On redirect examination of Godoy, Respondent asked ". . . essentially the information that you begin working with when Mr. McCrimmon and Mr. Minnitt and Martin Fong became suspects would have been after the time that you talked to Keith Woods in this case?" Godoy answered "Yes." Tab 16, page 205. This was false.

29. On redirect examination, Respondent asked Godoy "When was the first time you became aware personally that a former employee may have been involved in the El Grande homicide?" Godoy answered "When I spoke with Keith Woods on September the 8th of 1992." This was false.

30. In his closing statement, Respondent argued that Godoy didn't even know until after he talked to Keith Woods in the first week of September that one of the three participants in the case was a former employee of El Grande Market. This was false.

Unlike the Fong trial, the focus in the joint trial was on the credibility of Keith Woods, and not on the credibility of Detective Godoy and his reports. Defense attorney Baker Sipe's position was that his client Minnitt had made a false confession to Woods, that Woods had testified to rumor and guess work based on third-hand information, and that what Minnitt had said was false bravado. Defense attorney Levitt, on behalf of McCrimmon, argued that Woods had vague

information from female friends of McCrimmon and his testimony was the result of a rumor mill. Indeed, defense counsel had been furnished copies of Godoy's reports. Yet, they did not use the reports to impeach Godoy's testimony about what he knew prior to the Woods' interview.

COUNT TWO (MINNITT RETRIAL)

31. The convictions of McCrimmon and Minnitt in the joint trial were reversed on appeal for reasons unrelated to this disciplinary matter. The cases were then severed. Minnitt's retrial commenced before Judge Nichols August 28, 1997. Attorneys Eric Larsen and Wanda Day represented Minnitt. The retrial ended in a mistrial, due to a hung jury.

32. In a hearing on Motion in Limine held July 31, 1998, before Minnitt's second retrial, Respondent was asked whether he had reviewed Godoy's reports prior to the first Minnitt retrial. He answered "I am sure, at some point, I would have. At least I believe I would have." Respondent also stated he had met with Godoy prior to the first Minnitt retrial in August 1997. (State Bar Exhibit 1E, Tab 33, page 115.)

33. Godoy admitted during his Grand Jury testimony on June 25, 1999 that the testimony he gave in the Minnitt retrial about not having the names prior to his interview with Keith Woods was false. Respondent's Exhibit 37, pages 25-26. He also admitted to the Grand Jury that he knew the answers were false at the time he gave them. (Respondent Exhibit 37, pages 45-46.)

34. Respondent admitted in his Grand Jury testimony on June 25, 1999 that Detective Godoy's testimony in the Minnitt retrial about not having the names prior to the Woods' interview was false. (Respondent's Exhibit 38, pages 76; 97.)

35. On direct examination of Detective Godoy, Respondent asked Godoy whether at the time he interviewed Woods September 8, 1992 he had come up with the names Chris McCrimmon, Andre Minnitt, ChaChi, Martin Fong, on Martin Soto Fong. Detective Godoy answered "No." This was false. Respondent then asked whether the first time Godoy heard any of those three names would have been with the conversation with Woods on September 8, 1992. Godoy answered "Yes." This was false. (State Bar Exhibit 1-C, Tab 25, pages 9-10.

. . .

. . .

36. Respondent asked Godoy:

> And up until that time Keith Woods gave you those three names and you were able to track back to this Martin Soto Fong, had you ever submitted prints from any of these individuals to the identification sections and have them compared to the prints you managed to give?

Godoy answered "No." State Bar Exhibit 1-C, Tab 25, page 11. This was false. Godoy had submitted a number of prints for examination. In a report dated September 1, 1992, the examiner determined the prints of McCrimmon were on a car abandoned near the crime scene. (State Bar Exhibit 3.)

37. On redirect examination of Godoy, Respondent asked:

> When was it that you actually got to where it was that you learned that Chris McCrimmon and Andre Minnitt were potential suspects in this case? Would that have been after the conversation with Keith Woods?

Godoy answered "Yes." Tab 25, page 32. This was false.

38. At a bench conference on August 26, 1997 Respondent marked for identification Godoy's report of September 15, 1992. The State Bar argues that at that point Respondent had in his hands a report that discusses what Godoy knew before September 8, 1992. Respondent argues the fact he made it part of the record, indicates he was not trying to hide anything.

It is Judge Nichols' opinion, however, that:

> It was clear from the bench conference [August 26, 1997] that if Mr. Peasley had forgotten about Godoy's contact with the suspects on September 2, that that should have jogged his memory and he would have at that time said, Wait a minute. Yeah. (Respondent's Exhibit 47, deposition of Judge Nichols taken November 6, 2000 page 80.)

Judge Nichols continued:

> As I mentioned a moment ago, it would appear to be enough of a reminder to Mr. Peasley that Detective Godoy had that September 2 contact, that he would have taken steps at that time to correct the court's misapprehension of the case. I was clearly making erroneous rulings based on Mr. Peasley's avowals, and I thought his memory should have been refreshed by Mr. Larsen's remarks at the bench. (Page 81)

39. Judge Nichols made findings about Respondent's conduct in the Minnitt retrial. The findings are found in Respondent's Exhibit 47, deposition of Judge Nichols taken November 6, 2000. Tab 4 of the deposition is a Minute Entry dated July 31, 1998. After the hung jury in the Minnitt retrial, in anticipation that there would be a second retrial, Minnitt's counsel Larsen filed a Motion to Dismiss on grounds of prosecutorial misconduct and double jeopardy. The Court denied the motion, but made the following findings:

> THE COURT FINDS that there was misconduct on the part of the prosecution by asking questions that resulted in inaccurate information being given to the jury, and by using this misinformation to his advantage in his closing argument.
>
> THE COURT FINDS that this misinformation was in fact helpful to the State's case.
>
> THE COURT FINDS that the prosecution had several sources of information at its disposal that could have corrected this misinformation and which should have prevented its dissemination to the jury.

. . .

THEREFORE, THE COURT FINDS that the conduct is not merely a result of legal error, negligence, or mistake or insignificant impropriety since Detective Godoy and Mr. Peasley had discussed and litigated this very issue in two other trials and other court hearings prior to the August trial of Andre Minnitt. The Court cannot find that this conduct was engaged in with the intent to further an improper purpose.

HOWEVER, THE COURT FINDS that the conduct was engaged in with an indifference to a significant danger of a mistrial or reversal.

COUNT THREE (McCRIMMON RETRIAL)

40. McCrimmon's retrial commenced August 27, 1997 before Judge Nichols on the heels of the Minnitt retrial. Indeed, the McCrimmon retrial started while the Minnitt jury was still deliberating. McCrimmon was represented by attorney Richard Lougee.

41. Prior to the start of the McCrimmon retrial, defense counsel filed a Motion in Limine, alerting the court that, arguably, false testimony and argument had been given in the prior trials. Judge Nichols ruled that the defense could questions Detective Godoy about his prior testimony.

42. During direct examination by Respondent, Detective Godoy gave answers different than given in prior trials. For example, Respondent asked Godoy if he had submitted fingerprints for comparison before Godoy spoke with Woods. Godoy said he probably submitted fingerprints for McCrimmon and Minnitt before speaking with Woods. Respondent asked Godoy what was the first time Minnitt's name came up in the investigation. Godoy answered it was September 1 when Detective Mark Fuller told him that McCrimmon was an associate of Minnitt.

43. Defense counsel mounted an aggressive attack on Godoy's testimony and credibility. He asked Godoy about the incorrect answers he had given in testimony in prior trials. Defense counsel

presented a demonstrative exhibit entitled "What did Godoy know by 9/8/92" detailing information Godoy had before the Woods' interview. (Respondent's Exhibit 15.)

44. In his closing statement, Respondent tried to explain Godoy's answers in prior trials by arguing Godoy answered as he did to protect confidential sources and avoid mistrials.

45. Respondent argued that Godoy answered questions in the only way he could. Respondent contended it was a "sick system" that put officers in a position where they had to answer as Godoy had done in prior trials.

46. McCrimmon was acquitted.

COUNT FOUR (MINNITT POST-TRIAL MOTION FOR DEPOSITION)

47. In anticipation of a second Minnitt retrial, his counsel filed a Motion to take the deposition of Detective Godoy. In his written response to the motion (State Bar Exhibit 28), Respondent states:

> The defendant complains that Detective Godoy misled the jury in State v. McCrimmon. This is absolutely false.
>
> . . .
>
> Now, after the answer was explained in the McCrimmon trial [that is, that Godoy gave false answers in earlier trials to avoid mistrials], counsel wants to take a contrary position and assert that Detective Godoy misled the jury. This is unfair and untrue. Detective Godoy did exactly what he needed to do in order to avoid prejudicing the rights of Mr. Minnitt and further avoid the declaration of a mistrial.

COUNT FIVE (MINNITT POST-TRIAL MOTION TO DISMISS)

48. After the Minnitt retrial resulted in a hung jury, in anticipation of a third trial, Minnitt's counsel Larsen filed a motion on January 27, 1998 to dismiss, alleging prosecutorial misconduct by

Respondent and double jeopardy. In his response to the motion, Respondent stated:

> The defendant's motion is based upon a series of questions asked by the undersigned counsel [Respondent] and answered by Detective Godoy of the Tucson Police Department. In short, Godoy was asked whether or not he had come up with the names of several individuals, including the defendant Minnitt, prior to his conversations with Keith Woods. The statement of Keith Woods was given on September 8, 1992. The defendant Minnitt argues that these answers were untrue and that undersigned counsel was guilty of misconduct for asking Godoy, in a subsequent trial to explain the reason for the negative responses given under oath previously. In fact, with respect to the defendant Minnitt, the answers of Detective Godoy were true and accurate in every respect.

The Motion to Dismiss was denied.

49. On May 12, 1997, after receiving from the State Bar a copy of defense attorney Lougee's complaint against Respondent, Respondent filed a "Motion to Clarify." Respondent stated that the motion was "Submitted in order to clarify earlier pleadings." Respondent stated "This clarification is intended to make clear that the State is not professing that Minnitt was not a "suspect" prior to the conversations with Keith Woods."

CONCLUSIONS OF LAW

The State Bar has the burden of proving the allegations in the Complaint. Rule 54(d), Rules of the Supreme Court. The standard by which the burden must be proved is by "clear and convincing evidence." Rule 54(c). This standard requires more evidence than a preponderance, the standard in most civil cases, ~~but less~~ evidence than proof beyond a

reasonable doubt, the standard in criminal cases.

By clear and convincing evidence, the Hearing Officer finds as follows:

Count One (Joint Trial)

Respondent violated:

1. ER3.3(a)(4) (Offer evidence a lawyer knows to be false and failure to take reasonable remedial measures once the lawyer knows of the falsity.)

2. ER4.1(a) (Make false statement of fact to a third person) Respondent made false statements to the jury.

3. ER8.4(c) (Engage in conduct involving dishonesty or deceit.)

4. ER8.4(d) (Engage in conduct that is prejudicial to the administration of justice.)

Violations of the other ERs and Rules alleged in the Complaint were not found.

By all accounts, Respondent at the time of the El Grande trials, was a very experienced, highly qualified, extremely prepared, very aggressive, and highly-decorated prosecutor.

Prior to the Fong trial, he read Godoy's reports and discussed the case with Godoy. His conduct in questioning in the Fong trial demonstrated he knew the significance of what information Godoy had before the Woods' interview.

In the joint trial, which followed the Fong verdict by less than two weeks, Respondent again demonstrated he knew the significance of the timing of Godoy's information in the Woods' interview.

Respondent argues he should be absolved because Godoy's reports showing what Godoy knew prior to the Woods' interview were given to defense counsel, and they did not exploit the discrepancies between Godoy's reports and his testimony. Defense counsel in the joint trial chose to attack the credibility of Woods and reliability of his testimony rather than impeach Godoy with his reports that contradicted his testimony. Whether this was conscious trial strategy or serious oversight by defense attorneys, it does not absolve Respondent of his ethical obligations.

Detective Godoy tried to explain in the McCrimmon retrial that the reason he gave the answers he did in the joint trial was because he thought that, if he answered truthfully, he would be disclosing confidential sources and would cause a mistrial. This is unpersuasive. Even if it were the case, Respondent should have known better. Many of his questions regarding the timing of Godoy's information and the Woods' interview were precise and pointed and called for yes or no answers.

Count Two (Minnitt Retrial)

Respondent violated:

1. ER3.3(a)(4) (Offer evidence a lawyer knows to be false and failure to take reasonable remedial measures once the lawyer knows of the falsity.)

2. ER4.1(a) (Make false statement of fact to a third person) Respondent made false statements to the jury.

3. ER8.4(c) (Engage in conduct involving dishonesty or deceit.)

4. ER8.4(d) (Engage in conduct that is prejudicial to the administration of justice.)

Violations of the other ERs and Rules alleged in the Complaint were not found.

The Minnitt retrial started nearly four years after the joint trial. The issues were the same. Respondent asked Godoy questions about the timing of his information in the Woods' interview, and Godoy again answered falsely.

Count Three (McCrimmon Retrial)

No violations are found. The Hearing Officer recommends Count Three be dismissed.

By the time of the McCrimmon retrial, the cat was out of the bag. Defense attorney Lougee successfully exploited the inconsistency between Godoy's reports and his testimony in prior trials. Respondent's arguments that the system was at fault and Godoy answered the only way he could may have been fallacious, but they were not unethical.

Count Four (Minnitt Post-trial Motions)

No violations are found. The Hearing Officer recommends Count Four be dismissed.

Again, Respondent was trying to rehabilitate Godoy's testimony and argue from the record as it existed. The State Bar did not even address this Count in its closing statement.

Count Five (Minnitt Post-trial Motion to Dismiss)

No violations are found. The Hearing Officer recommends Count Four be dismissed.

Again, Respondent was trying to rehabilitate Godoy's testimony and argue from the record as it existed. The State Bar did not even address this Count in its closing statement.

ABA STANDARDS

Generally, the American Bar Association's S*tandards for Imposing Lawyer's Sanctions* are used in considering the appropriate sanction for a violation of the Arizona Rules of Professional Conduct. In re Ockrassa, 165 Ariz. 576, 799 P.2d 350 (1990).

ABA Standard 3.0 provides that four criteria should be considered:

1. The Duty Violated. The duties of a prosecutor, if not self-evident, are clearly set out in the Rules of Professional Conduct. Respondent violated his duty to the public, the court and as a professional. As stated by the Arizona Supreme Court, the more serious the criminal charges the greater the duty:

> We note and consider that these violations occurred in the course of representation in a very serious criminal matter. What might be excusable in handling a traffic violation is not to be tolerated in a charge such as this. Matter of Wolfram, 174 Ariz. 49, 57, 847 P.2d 94 (1993).

2. The lawyer's mental state. Respondent was either oblivious to his obligations or intentionally disregarded them. Respondent acted intentionally. Respondent was stressed, overworked, and ill at the time of the retrials in 1997. At the McCrimmon/Minnitt joint trial in 1993, however, he appeared perfectly fit.

3. The actual or potential injury caused by the lawyer's misconduct. Respondent conduct caused potential injury. The death penalty was sought.

4. Existence of aggravating or mitigating factors.

This Hearing Officer considered aggravating and mitigating factors pursuant to Standards 9.22 and 9.32, respectively.

The Hearing Officer finds the following aggravating factors:

9.22(i) substantial experience in the practice of law[1]

The Hearing Officer finds the following mitigating circumstances under Standard 9.32:

a) Absence of a prior disciplinary record

e) Cooperative attitude toward disciplinary proceedings

g) Character or reputation. Testifying at hearing to Respondent's good character and were Superior Court Judge Deborah Bernini, United States District Court Judge Rainer Collins, United States Magistrate Judge Bernardo Velasco, criminal defense attorneys Michael Piccarreta and Alfred "Skip" Donau, the last two by deposition.

In addition, letters were submitted on Respondent's behalf by Superior Court Judge Lina Rodriguez, retired Superior Court Judge Robert Buchanan, Superior Court Judge John Davis, Superior Court Commissioner Sharon Douglas, retired Superior Court Judge Margaret Houghton, and Superior Court Judge Cindy Jorgenson. (At the time she wrote the letter, Judge Jorgenson was on the Superior Court. She has since been appointed to United States District Court.)

Also considered were letters on Respondent's behalf from defense attorney Howard Kashman, Deputy Pima County Attorneys Rick Unklesbay, Jane Westby, and David White. Also considered was a letter from Pima County Attorney Barbara LaWall.

This character evidence in support of Respondent is a significant mitigating factor as it comes from respected members of

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[1]The aggravating factor of substantial experience in the practice of law is often offset by the corresponding factor of an unblemished disciplinary record during the same time period. *Matter of Shannon*, 179 Ariz. 52, 68 (1994). While substantial experience in the practice of law can be an aggravating factor, when combined with the absence of any prior discipline, it may be considered a mitigating factor. *Matter of Marce*, 177 Ariz. 25, 867 P.2d 845 (1993).

the judiciary, respected and experienced criminal defense attorneys, and Respondent's colleagues.

h) Physical or mental disability or impairment. This mitigation circumstance applies only to the Minnitt and McCrimmon retrials in August 1997. It does not apply to the initial joint trial of McCrimmon and Minnitt in November 1993. In early summer 1997, Respondent began experiencing medical problems. He had vision problems, pain on his left side, periodic vertigo, and difficulties in focusing and concentration. Respondent sought medical care first at Thomas-Davis Medical Clinic and then at St. Joseph's Hospital. On September 13, 1997 the medical records in evidence confirm Respondent had these complaints. Respondent testified at hearing that he had experience these symptoms for a few months, but the level of intensity had peaked in the few weeks prior to his hospital visit.

Defense attorney Larsen testified that, earlier in the year 1997, he noticed Respondent was trying too many cases and felt that kind of caseload would inevitably take its toll. Larsen further testified that Respondent sought a continuance for a few days because of health reasons before the commencement of the Minnitt retrial August 20, 1997. This request was denied. Similarly, defense attorney Lougee testified that, prior to the commencement of the McCrimmon retrial on August 27, 1997, Respondent asked for a couple days off due to his health. The request was denied.

Judge Nichols, who presided at the retrials, testified at deposition that Respondent requested a continuance because he was not feeling well due to vertigo, dizziness, and difficulties with vision. Judge Nichols also testified that Respondent's legal assistance Tracey Miller informally told him Respondent was having medical problems.

Attorney Michael Bloom testified about a homicide case he had with Respondent in 1997, *State v. Encinas*. The case went to trial three times in 1997: the first trial in March, the second in the summer, and the third in the latter part of the year. Mr. Bloom testified that Respondent was very busy, not focused on the facts of the case, and his preparation was superficial and not what would be expected in a first-degree murder case. At the third trial, *Encinas* was found not guilty.

In the disciplinary hearing, Respondent's assistant Miller testified about Respondent's medical problems during the retrials in

August 1997. She also testified about Respondent's trial calendar during that year. In year 1997, Respondent had 15 felony jury trials, four of which were death penalty cases. He was in trial 70 days. (Respondent's Exhibit 8.)

i) Delay in disciplinary proceedings. Although the underlying murders occurred in June 1992, the complaint to the State Bar regarding Respondent's conduct was made in September 1997 by Mr. Lougee. Considerations of delay should therefore start on that date. The State Bar did not forward the Complaint to Respondent for response until March 1998, nearly six months later. Respondent submitted a response to the informal Complaint. A Probable Cause Order was entered May 21, 1999. There were settlement negotiations, but the Complaint was not filed until May 11, 2000, nearly a year later. After the Complaint was filed Respondent was granted several continuances, but, given the complexity of the case, it proceeded expeditiously.

j) Interim rehabilitation. Respondent testified he has taken steps to reduce his caseload, reduce the number of cases he has tried, and adequately prepare. He has encouraged other attorneys in his office to do likewise so as not to make the same mistakes he made.

PROPORTIONALITY REVIEW

The Arizona Supreme Court has held that discipline should be proportionate to the violation and consistent with discipline imposed in similar factual situations. In re Wines, 135 Ariz. 203, 660 P.2d 454 (1983) and In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993). The Hearing Officer finds the following cases applicable:

1. Matter of Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993). Wolfram, a defense attorney, failed adequately to prepare for trial and was found to have committed misconduct. He was suspended for 18 months. Wolfram indicates that in criminal cases where the defendant faces a loss of liberty, the potential harm caused by ethical misconduct is given added significance, over and above that involved in civil cases. Where the harm or potential for harm is greater, the sanction should reflect that consideration.

2. Matter of Hansen, 179 Ariz. 229, 877 P.2d 802 (1994). Hansen, a prosecutor, lied to the court to cover her error in prematurely releasing a witness. The prosecutor released the witness prior to trial, and later told the court when the matter was called that she was not

ready to proceed as the witness was not present. Hansen failed to advise either the court or the defendant's attorney that the witness had been in court earlier, and that Hansen had told the witness to leave. The court in Hansen stated that the presumptive sanction was suspension or disbarment; however, because the sanction imposed was a censure because of the extremely significant mitigation presented by Hansen. The Disciplinary Commission, in a report adopted by the Supreme Court, recognized that suspension or disbarment was warranted, absent the mitigation.

3. Florida Bar v. Cox, 794 So.2d 1278 (2001). The Florida State Bar suspended Cox, an Assistant United States Attorney in a criminal prosecution, for a period of one year. Cox knowingly presented false evidence during a criminal prosecution. The Florida Supreme Court found that her intent in doing so was to obtain a benefit for the witness. The court determined that disbarment was the presumptive sanction, but found mitigation resulting in a one-year suspension.

4. Matter of Brey, 171 Wis. 2d 65, 490 N.W. 2d 15 (1992). Brey was found to have abused his authority as a prosecutor, which seriously threatened to subvert the rights of a criminal defendant. Brey also made false statements to the court and disciplinary board in order to prevent the misconduct from being discovered. Brey was given a 60-day suspension.

5. In re Norton and Kress, 128 N.J. 520, 608 A.2d 328 (1992). Both Norton and Kress were prosecutors who informed the court that police officers did not wish to pursue a drunk driving case resulting in a dismissal of the case when they knew the information was false. Each received a three-month suspension.

6. Disciplinary Counsel v. Greene, 74 Ohio St. 3d 13, 655 N.E. 2d 1299 (1995). Greene knowingly lied to the court with the intent to mislead the judge into ordering a dismissal. The court found that the Board's recommendation for a public reprimand was in appropriate and gave Greene a one-month suspension.

RECOMMENDATION

The purpose of lawyer discipline is not to redress alleged wrongs committed in criminal proceedings. The criminal courts are responsible for that.

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. In re Fioramonti, 176 Ariz. 182, 859 P.2d 1315, (1993). It is also the objective of lawyer discipline to protect the public, the profession, and the administration of justice. In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the Bar's integrity. Matter of Horwitz, 180 Ariz. 20, 881 P.2d 352 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's Standards for Imposing Lawyers Sanctions and the proportionality of discipline imposed in analogous cases. Matter of Bowen, 178 Ariz. 283, 872 P.2d 1235, (1994).

After consideration of the facts, application of the Standards, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends the following:

1. Respondent shall be suspended for 60 days for the violations found. The presumptive discipline under ABA Standard 6.11 is disbarment. This Hearing Officer, however, finds the mitigating factors, including Respondent's 25 years of devoted and successful service to Pima County and the State of Arizona, to be sufficiently compelling to warrant a suspension.

2. Respondent shall be placed on probation for a period of one year under the following terms and conditions:

a) Maintain a caseload not exceeding 20 cases, a maximum of 15 of which are homicide cases;

b) Submit to an LOMAP audit, as requested by the State Bar, concerning his caseload and trial preparation activities; and

c) File a quarterly report with the State Bar concerning his caseload and trial activity.

3. No restitution is applicable in this case.

4. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

Perhaps no occupations are more difficult than those of law enforcement and criminal prosecution. It is also true that no two professions more require honesty and professionalism in order to command the public trust.

Dated this 1st day of July, 2002.

/s/
Michael Drake
Hearing Officer 9G

The foregoing was mailed this 1st day of July, 2002 to:
Patricia Seguin
PSeguin@supreme.sp.state.az.us
Hearing Coordinator
Disciplinary Commission of the
Supreme Court of Arizona
Certification & Licensing
1501 W. Washington, Suite 104
Phoenix, AZ 85007-3231

Original filed with the Disciplinary Clerk
this 1st day of July, 2002.

Copy of the foregoing faxed and mailed
this 1st day of July, 2002, to:
James W. Stuehringer
Respondent's Counsel
Waterfall, Economidis, Caldwell, Hanshaw & Villamana, P.C.
5210 E. Williams Circle, Suite 800
Tucson, AZ 85711-4473

Karen Clark
Bar Counsel
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

by /s/

APPENDIX D

AUG 3 /98 PM 4:08 FREC

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. RICHARD NICHOLS CASE NO. CR-40086

COURT REPORTER: Dorian Suter DATE: July 31, 1998

STATE OF ARIZONA Rick Unklesbay
VS.
ANDRE MINNITT Eric Larsen
Wanda Day

MINUTE ENTRY

DEFENDANT' S MOTION TO DISMISS; DEFENDANT'S MOTION TO DECLARE DETECTIVE GODOY AND KEN PEASLEY HOSTILE WITNESSES:

Defendant not present, in custody Department of Corrections, presence waived.

The State moves that the Court not hear the motion to dismiss having previously ruled on it.

THE COURT FINDS that the subsequent motion to dismiss was better documented and raises issues which entitle the Defendant to a hearing.

IT IS ORDERED that the State's motion not to hear the Defendant's Motion to Dismiss is denied.

Counsel make statements to the Court.

Mr. Larsen moves to invoke the rule and said motion is granted.

Joseph Godoy is sworn, examined, questioned by the Court and cross-examined by Mr. Larsen.

As to the Defendant's motion to designate Ken Peasley a hostile witness,

IT IS ORDERED that Mr. Larsen may ask leading questions.

Ken Peasley is sworn and examined by Mr. Larsen.

12:10 p.m. Court stands at recess until 1:00 p.m. this date.

1:00 p.m. Same counsel present. Dorian Suter reporting.

Ken Peasley resumes the stands and is further examined by Mr. Larsen, questioned by the Court, cross-examined.

Defense rests. Both sides rest.

Mr. Larsen and Mr. Unklesbay make closing arguments to the Court.

THE COURT FINDS that there was misconduct on the part of the prosecution by asking questions that resulted in inaccurate information being given to the jury, and by using this misinformation to his advantage in his closing argument.

THE COURT FINDS that this misinformation was in fact helpful to the State's case.

THE COURT FINDS that the prosecution had several sources of information at its disposal that could have corrected that misinformation and which should have prevented its dissemination to the jury.

THEREFORE, THE COURT FINDS that the conduct is not merely a result of legal error, negligence, mistake or insignificant impropriety since Detective Godoy and Mr. Peasley had discussed and litigated this very issue in two other trials and other court hearings prior to the August trial of Andre Minnitt. The Court cannot find that this conduct was engaged in with the intent to further an improper purpose.

HOWEVER, THE COURT FINDS that the conduct was engaged in with an indifference to a significant danger of a mistrial or reversal.

Based on these findings,

THE COURT FINDS the "misconduct" prong of the "Pool-Miller" double jeopardy test has been met.

As to the issue of whether the mistrial resulted from misconduct or from the fact that the jury was unable to reach a verdict,

Mr. Larsen and Mr. Unklesbay argue to the Court.

The Court cannot find on this record and on the transcripts of the previous trials that the mistrial was granted as a result of misconduct.

THEREFORE, IT IS ORDERED that the motion to dismiss is denied.

IT IS FURTHER ORDERED setting the matter for trial on October 6, 1998 at 10:30 a.m.

The State is directed to prepare the writ to have the defendant transferred to Pima County.

cc: Hon. Richard Nichols
Criminal Calendaring
County Attorney - Unklesbay/Peasley (writ to issue)
Eric Larsen, Esq.
Wanda Day, Esq.
Sheriff

Pat Dini